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ABSTRACT

A collection of papers and programs from a series of regional seminars conducted in 1978 and entitled "Bakke and Beyond" are presented. Cosponsored by the Education Commission of the States, the Aspen Institute, and the Western Interstate Commission for Higher Education, the programs focused on various impacts of the Bakke decision. Papers included from the several regional seminars are: a welcome speech on "Bakke and Beyond" (Patricia Saiki); The Educational Impact of Affirmative Action on Colleges and Universities (Barbara Newell); From Discrimination to Affirmative Action (Arvo Van Alstyne); The Decision and Its Background (Robert B. McKay) and a summary of remarks (Luis Negales); From Discrimination to Affirmative Action (Vernon E. Jordan); The Remand of Bakke (Nathan Z. Dershowitz); Testing/Admissions: What Can and Cannot Be Done (Stephen J. Wright); After Bakke: The Role of the States (J. M. Rosser); The Bakke Decision and Graduate School Admissions: What Is Equitable? (James G. Traynham); Beyond Bakke: The Positive Benefits of Testing (Cameron Fincher); The Role of Testing in Affirmative Action and Supplementary Tables (Winton H. Manning); and Issues Related to Affirmative Action: Policies and Programs for Admission and Retention of Minority Students (Paul B. Mohr). (SF)

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BAKKE AND BEYOND

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WELCOME SPEECH "BAKKE AND BEYOND" SEMINAR

Senator Patricia Saiki
State of Hawaii

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September 13, 1979
San Diego, California

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WELCOME SPEECH
"BAKKE AND BEYOND" SEMINAR
SEPTEMBER 13, 1978
PRESENTED BY STATE SEN. PATRICIA SAIKI
CHAIRMAN, WESTERN INTERSTATE COMMISSION FOR HIGHER EDUCATION

WELCOME TO EACH OF YOU ON BEHALF OF THE ASPEN INSTITUTE FOR HUMANISTIC STUDIES, THE CALIFORNIA POSTSECONDARY EDUCATION COMMISSION, THE EDUCATION COMMISSION OF THE STATES, AND THE WESTERN INTERSTATE COMMISSION FOR HIGHER EDUCATION. THIS SEMINAR, THE FIRST OF SIX TO BE HELD THROUGHOUT THE COUNTRY THIS FALL, HAS BEEN MADE POSSIBLE THROUGH A FORD FOUNDATION GRANT. A SPECIAL THANKS TO YOU, PAT CALLAN, AND TO THE CALIFORNIA POSTSECONDARY EDUCATION COMMISSION FOR INVITING ALL OF US FROM THROUGHOUT THE WEST TO CONVENE IN THE STATE WHICH EXPERIENCED THE BAKKE CASE FIRST HAND.

YOU KNOW IT IS VERY UNUSUAL FOR NATIONAL, REGIONAL, AND STATE COMMISSIONS TO JOIN HANDS WITH A NATIONAL INSTITUTE TO CO-SPONSOR A SEMINAR FOR DECISION MAKERS FROM THROUGHOUT THE WESTERN UNITED STATES. THAT'S QUITE A TEAM EFFORT. SUCH TEAMWORK OCCURS ONLY FOR HIGHLY SIGNIFICANT TOPICS. THE SUPREME COURT'S RULING IN THE BAKKE CASE IS SUCH A TOPIC. IT IS SIGNIFICANT BECAUSE IT COULD ULTIMATELY TOUCH EVERY PERSON ASPIRING TO ENTER A COLLEGE, UNIVERSITY, OR PROFESSIONAL SCHOOL. IT IS CRUCIAL THAT WE WHO HELP SHAPE EDUCATION TODAY UNDERSTAND THIS DECISION AND ITS IMPLICATIONS AS WE CREATIVELY STRUGGLE WITH THE ISSUE OF EQUITY IN ACCESS.

I THINK WE ARE FORTUNATE AS WE FACE THE MANY QUESTIONS ARISING OUT OF THE BAKKE DECISION, THAT WE HAVE THE WEIGHT OF THE PEOPLE OF THE UNITED STATES AND THEIR GOVERNMENT ON THE SIDE OF HELPING MINORITY GROUPS. CONTRARY TO WHAT SOME MAY BELIEVE THE POLICY OF AIDING MINORITIES IS NOT SOME WHIM OF LEGISLATORS, BUREACRATS OR THE COURTS. RATHER IT IS A COMMITMENT OF THE PEOPLE OF THE UNITED STATES THROUGH THEIR GOVERNMENT.

MANY HIGHER EDUCATION ADMINISTRATORS CONSIDER THE BAKKE DECISION TO BE A COLOSSAL ENIGMA. BUT WHAT WOULD HAVE HAPPENED HAD THERE BEEN NO COURT DECISION ON THIS ISSUE? PUBLIC CONFIDENCE IN AFFIRMATIVE ACTION, THAT EFFORT BORN IN THE '60s TO PROVIDE GREATER ACCESS IN EDUCATION TO MINORITIES, HAD ALREADY BEGUN TO ERODE. AFFIRMATIVE ACTION PROGRAMS WERE BEING RIDICULED IN SOME CIRCLES. APPLICANTS TO SOME COLLEGES AND PROFESSIONAL SCHOOLS FELT THEY HAD BETTER CHANCES FOR ACCEPTANCE IF THEY WERE FEMALE AND HAD SPANISH SURNAMES. AND MANY WHITE AMERICANS, PARTICULARLY MEN, SAID THAT AFFIRMATIVE ACTION, CONCEIVED TO COMBAT DISCRIMINATION, HAD EVOLVED INTO A CREATURE THAT DISCRIMINATED AGAINST THEM.

ALSO, AFFIRMATIVE ACTION UNWITTINGLY STEREOTYPED ETHNIC MINORITIES AS "LESS QUALIFIED" THAN OTHER STUDENTS, WHICH JUST ISN'T TRUE. YET BECAUSE MINORITIES WERE ENROLLED ACCORDING TO DIFFERENT STANDARDS, THEY WERE PIGEONHOLED AS "INFERIOR". AFFIRMATIVE ACTION PROGRAMS HAD NOT BEEN ABLE TO AVOID THIS, AND

IF PREFERENTIAL ADMISSIONS PROGRAMS HAD CONTINUED TO STIGMATIZE THOSE OF PARTICULAR RACES OR COLORS AS BEING LESS QUALIFIED, THEN PHYSICIANS, LAWYERS, AND OTHER PROFESSIONALS WHO ARE MINORITIES COULD BE LESS RESPECTED OR TRUSTED.

SO, ALTHOUGH MINORITIES WERE ENJOYING GREATER EDUCATIONAL OPPORTUNITIES THAN EVER BEFORE BECAUSE OF AFFIRMATIVE ACTION, PUBLIC SUPPORT OF THE PROGRAM WAS DIMINISHING. IF AFFIRMATIVE ACTION CONTINUED TO OPERATE AS IT HAD, THE PUBLIC MAY HAVE REACTED TO ITS NEGATIVE EFFECTS BY DEALING IT A QUICK, BRUTAL, EMBARRASSING DEATH.

IN THIS CLIMATE THE SUPREME COURT HANDED DOWN THE BAKKE DECISION. THE JUDGES COULD HAVE DECLARED THE CONCEPT OF AFFIRMATIVE ACTION DISCRIMINATORY. THAT WOULD HAVE MADE IT MORE DIFFICULT THAN IT WAS A DECADE AGO TO PROVIDE EQUAL EDUCATIONAL OPPORTUNITIES, BECAUSE THE CONCEPT OF AFFIRMATIVE ACTION WOULD HAVE BEEN SO TARNISHED THAT THE PUBLIC MAY HAVE BEEN UNWILLING TO TRY AGAIN TO EQUALIZE EDUCATIONAL OPPORTUNITY AMONG ALL PEOPLE. THE BAKKE DECISION KEPT US FROM SUCH A RETREAT.

OR THE SUPREME COURT COULD HAVE DECLARED THE SPECIAL ADMISSIONS PROGRAM OF THE UNIVERSITY OF CALIFORNIA AT DAVIS CONSTITUTIONAL AND DISMISSED ALLAN BAKKE'S ATTEMPT TO BECOME A PHYSICIAN. THIS WOULD HAVE LIT A FUSE AMONG AMERICANS WHO BELIEVE THAT ALLAN BAKKE WAS INDEED THE OBJECT OF DISCRIMINATION.

INSTEAD, THE COURT UPHELD THE CONCEPT OF AFFIRMATIVE ACTION, BUT DECLARED THAT THE SETTING OF QUOTAS IN ADMISSIONS PROGRAMS DOES NOT DETERMINE EQUAL OPPORTUNITY. RACIAL QUOTAS ALONE CANNOT BE USED TO DETERMINE ADMISSIONS, THE COURT STATED. BUT RACE CAN BE ONE OF A VARIETY OF FACTORS CONSIDERED. THE COURT LAUDED DIVERSITY IN A STUDENT BODY AND APPROVED THE USE OF ETHNIC DIVERSITY AS ONE FACTOR.

WHERE DOES THAT LEAVE US TODAY? U.S. NEWS & WORLD REPORT ESTIMATES THAT 150 UNDERGRADUATE, GRADUATE, AND PROFESSIONAL SCHOOL ADMISSIONS PROGRAMS PROVIDE A FIXED NUMBER OF SLOTS FOR MEMBERS OF RACIAL MINORITY GROUPS. SUCH PROGRAMS MUST NOW BE ABOLISHED. AND ON HUNDREDS OF OTHER U.S. CAMPUSES, OFFICIALS MUST REVIEW THEIR POLICIES TO SEE WHETHER INFORMAL "SET-ASIDE" POLICIES, ADMISSIONS GOALS, AND "TWO-TRACK" SYSTEMS MEASURE UP TO THE COURT'S GUIDELINES.

SOME PEOPLE PREDICT THAT SCHOOLS WILL BE OVERLY CAUTIOUS IN ADMITTING MINORITIES UNTIL THEY ARE CONFIDENT THAT THEIR ADMISSIONS POLICIES ARE WITHIN THE GUIDELINES OF THE BAKKE CASE. "BETTER TO BE CAUTIOUS THAN TO FIGHT IN COURT," THEY SAY. THIS COULD HAVE A REVERSE AFFIRMATIVE ACTION EFFECT, KEEPING QUALIFIED MINORITIES OUT OF SCHOOL. WE CANNOT ALLOW THIS TO HAPPEN. OTHER EDUCATORS PREDICT THAT BAKKE COULD BE THE BEGINNING OF THE END OF AFFIRMATIVE ACTION, SINCE THE COURT GAVE ADMINISTRATORS ONLY VAGUE GUIDELINE TO FOLLOW.

STILL OTHERS FORESEE THE BAKKE DECISION HERALDING AN ERA OF EVEN GREATER AFFIRMATIVE ACTION/EQUAL OPPORTUNITY GROWTH FOR ALL SEGMENTS OF SOCIETY, NOT JUST FOR RACIAL MINORITIES. THIS IS POSSIBLE, AND THIS IS WHAT I BELIEVE. AND THIS IS WHERE YOU, THE HIGHER EDUCATION DECISION MAKERS IN YOUR STATES, CAN BREAK NEW GROUND.

NORMAN DORSEN, BOARD CHAIRMAN OF THE AMERICAN CIVIL LIBERTIES UNION, HAS ASTUTELY PREDICTED, "...IT IS THE SCHOOL ADMISSIONS OFFICERS AND THE ADMINISTRATORS WHO WILL BE CRUCIAL IN DETERMINING WHAT THE IMPACT OF THE BAKKE DECISION IS." HE COULDN'T BE MORE CORRECT.

IF WE ARE TO AVOID FURTHER FEDERAL INTERVENTION AND PRESERVE THE MANAGEMENT OF HIGHER EDUCATION AT THE LOCAL AND STATE LEVELS WHERE I FEEL IT TRULY BELONGS, THEN IT WILL BE LEFT TO US TO DETERMINE A DESIGN THROUGH WHICH WE CAN FULFILL OUR COMMITMENT TO AFFIRMATIVE ACTION WITHOUT VIOLATING THE GUIDELINES ESTABLISHED BY THE COURT.

AT THIS SEMINAR TODAY WE ARE NOT TALKING ABOUT MERELY GUARDING THE LIFE OF ADMISSIONS PROGRAMS. WE ARE TALKING ABOUT GUARDING EDUCATIONAL OPPORTUNITIES FOR PEOPLE. THAT IS WHY WE ARE HERE. THAT IS OUR CHALLENGE. THAT IS OUR RESPONSIBILITY. IT'S A TOUGH CHALLENGE AND IT WILL DEMAND MUCH IN STUDY, KNOWLEDGE, WISDOM, FLEXIBILITY AND COMPASSION FOR ALL SIDES INVOLVED.

MAY WE BE PRODUCTIVE, AND MAY OUR ACTIONS TOMORROW MEET THE NEEDS OF ALL SEGMENTS OF SOCIETY.

BAKKE AND BEYOND

THE EDUCATIONAL IMPACT OF AFFIRMATIVE ACTION ON COLLEGES AND UNIVERSITIES

Barbara Newell
President
Wellesley College

September 13, 1978
San Diego, California

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THE EDUCATIONAL IMPACT OF AFFIRMATIVE ACTION ON COLLEGES AND UNIVERSITIES

FOR THOSE WHO MARCH TO THE TUNE OF AFFIRMATIVE ACTION, THE SUPREME COURT HAS REAFFIRMED THE PARADE ROUTE BY PERMITTING RACE AS A CRITERIA FOR ADMISSIONS. FOR THOSE WHO WISH TO DRAG THEIR FEET, EXCUSES ARE ALSO PROVIDED. (PARENTHETICALLY, IN THE LONG RUN THE COMMENTS OF JUDGE POWELL ON SEX AS DIFFERENTIATED FROM QUESTIONS OF RACE MAY BE THE LEAST DISCUSSED BUT THE MOST LASTING RESULT OF THE BAKKE DECISION.)

TO DATE, REPRESENTATIVES OF THE HIGHER EDUCATION COMMUNITY HAVE CHOSEN TO INTERPRET THE BAKKE DECISION AS ALLOWING A REAFFIRMATION OF THE AMERICAN COMMITMENT TO EXPANDED EDUCATIONAL OPPORTUNITY FOR MINORITY CITIZENS.

JACK PELTASON, PRESIDENT OF THE AMERICAN COUNCIL ON EDUCATION, WAS QUOTED RECENTLY AS SAYING, "WE (OF AMERICAN HIGHER EDUCATION) HAVE VERY FEW PROGRAMS AT THE ADMISSIONS LEVEL THAT WON'T MEET THE CONSTITUTIONAL STANDARDS LAID DOWN BY THE COURTS FIVE-TO-FOUR DECISION."[1]

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1 News Notes, Association of Governing Boards of Universities and Colleges, Volume 9, Number 7, July 1978

A GROUP OF ADMISSIONS DIRECTORS WROTE FOR THE COLLEGE ENTRANCE EXAMINATION BOARD A REVIEW OF THE BAKKE DECISION FOR EACH TYPE OF HIGHER EDUCATION INSTITUTION. AFTER DISCUSSING MANY OPEN ADMISSIONS SCHOOLS, THEY WENT ON TO SAY ABOUT THE MORE SELECTIVE INSTITUTIONS: "BECAUSE OF THE NEED TO REFUSE ADMISSION TO SOME ACADEMICALLY QUALIFIED STUDENTS IN ORDER TO ACCOMMODATE SOME MINORITIES WITH LOWER QUALIFICATIONS, INSTITUTIONS EMPLOYING COMPETITIVE ADMISSIONS PRACTICES ARE PARTICULARLY VULNERABLE TO COURT ACTION AND MAY EXPECT LEGAL CHALLENGES TO THEIR ADMISSIONS PRACTICES. HOWEVER, IT SEEMS LIKELY THAT INSTITUTIONS WITH WELL-CONCEIVED PLANS FOR INCREASING THE DIVERSITY OF THEIR STUDENT POPULATION, FOR EXAMPLE, A GOAL OF A RACIAL COMPOSITION THAT RESEMBLES THE RACIAL COMPOSITION OF THE GEOGRAPHICAL AREA GENERALLY SERVED BY THE INSTITUTION, WILL FIND SUPPORT IN THE COURT'S DECISION ON BAKKE. INSTITUTIONS, THEREFORE, MUST ARTICULATE THEIR GOALS IN TERMS OF THE DEGREE AND NATURE OF DIVERSITY THEY HOPE TO ACHIEVE."*

*Implications of the Bakke decision for Undergraduate Admissions Policies and Practices by Stan Berry, Director of Admissions, Washington State University; Eugene Caruthers, Director of Admissions and Records, Meharry Medical College; Edwin H. Cooper, Dean of Admissions and Records, Texas A & M University; Stirling L. Huntley, Director of Admissions and Associate Dean of Graduate Studies California Institute of Technology; Cliff Sjogren, Director of Admissions, University of Michigan; Leo J. Sweeney, Director of Admissions and Registrar, University of Missouri - Kansas City; Lee Wilcox, Associate Director of Academic Services, University of Wisconsin - Madison. July 7, 1978

I AGREE WITH PRESIDENT PELTASON THAT THE BAKKE CASE REQUIRES LITTLE CHANGE IN ADMISSIONS PRACTICE, AND I AGREE WITH THESE ADMISSIONS EXPERTS THAT THERE MUST BE GREATER CARE IN THE ARTICULATION OF ADMISSIONS OBJECTIVES. IN SUMMARY, HOW INSTITUTIONS CHOOSE TO ACT ON THE BAKKE DECISION IS WHAT COUNTS.

LET ME TRY TO OUTLINE SOME COMMONLY HELD ADMISSIONS OBJECTIVES SO YOU WILL UNDERSTAND WHY I AM PLEASED RACE IS VIEWED AS A JUSTIFIABLE CRITERION BY THE COURT AND WHY I BELIEVE IT IS URGENT FOR COLLEGES TO MAINTAIN EFFECTIVE AFFIRMATIVE ACTION ADMISSIONS PROGRAMS.

ADMISSIONS POLICIES AT THE UNDERGRADUATE LEVEL ARE SET 1) BY THE MISSION OF THE COLLEGE 2) WITH AN INTEREST IN THE SURVIVAL OF THE INSTITUTION, AND 3) BY THE EDUCATIONAL IMPACT BROUGHT ABOUT BY A GIVEN ADMISSIONS POLICY.

AMERICA HAS BEEN PROUD OF THE DIVERSITY OF MISSIONS OF ITS INSTITUTIONS OF HIGHER LEARNING. SOME INSTITUTIONS STATE THAT THEIR MISSION IS AS SPECIFIC AS THE TRAINING OF MISSIONARIES OR ACCOUNTANTS. OTHERS ARE SO AMBITIOUS AS TO ASSERT THEIR DEDICATION TO THE EDUCATION OF THE INTELLECTUALLY CURIOUS OR TO EDUCATIONAL OPPORTUNITY TO ASSIST SOCIAL MOBILITY.

THE MOMENT EDUCATIONAL INSTITUTIONS CHOOSE SUCH DIVERGENT GOALS, THE ADMISSIONS CRITERIA MUST INCLUDE UNQUANTIFIABLE VALUE JUDGMENTS ABOUT PROSPECTIVE STUDENTS. TO DATE WHEN THE MISSION OF AN INSTITUTION RESTRICTED FUTURE OPPORTUNITIES FOR SOME SEGMENT OF YOUTH BECAUSE OF RACE, THE COURTS AND THE PUBLIC HAVE RAISED QUESTIONS.

WITH THIS EXCEPTION OF RACIAL BARRIERS THE COURTS HAVE BACKED THE RIGHT OF INSTITUTIONS TO MAKE VALUE JUDGMENTS OF THE SORT THAT PERMIT CONTINUED DIVERSITY IN ADMISSION STANDARDS AS THESE STANDARDS CORRESPOND TO DIVERSITY OF EDUCATIONAL MISSION.

IN A MUCH MORE SENSITIVE AND DIFFICULT AREA ARE THOSE ADMISSIONS POLICIES THAT ARE PERCEIVED AS ASSISTING IN THE PERPETUATION OF AN INSTITUTION THROUGH DEVICES AIMED AT MAINTAINING ALUMNAE LOYALTY WHETHER BY ADMITTING ALUMNAE CHILDREN OR SUPPORTING THE FOOTBALL TEAM. ALL OF HIGHER EDUCATION MANAGEMENT IS SENSITIVE TO SUCH ISSUES BECAUSE SURVIVAL IS DEPENDENT UPON GOODWILL.

FINALLY AND MOST IMPORTANTLY, AS IT RELATES TO THE BAKKE CASE, THERE IS AN INCREASING RECOGNITION BY ADMISSIONS OFFICERS OF THE IMPACT OF ONE'S STUDENT PEERS ON THE EDUCATION PROCESS ITSELF. THIS IS NOT A

NEW IDEA. USING A SIMPLIFIED VERSION OF WELLESLEY HISTORY AS AN EXAMPLE, WELLESLEY FROM THE BEGINNING HAS SOUGHT DIVERSITY BY THE INCLUSION OF STUDENTS FROM DIFFERENT FAMILY INCOME LEVELS. HENRY FOWLE DURANT, THE FOUNDER OF WELLESLEY COLLEGE IN 1875, EXPECTED HIS INSTITUTION TO EDUCATE TEACHERS FOR THE FRONTIER AND TO TRAIN MISSIONARIES. HE WAS SENSITIVE TO THE NEED TO ESTABLISH THE APPROPRIATE COLLEGE MILIEU TO PRODUCE WOMEN DEDICATED TO SUCH CONCERNS. HE THEREFORE SET ABOUT THE TASK OF ESTABLISHING SUBSTANTIAL SCHOLARSHIP FUNDS AND REMEDIAL COURSES TO GET THOSE WITH LIMITED ACADEMIC TRAINING UP TO COLLEGE LEVEL.

THE EDUCATIONAL ADVANTAGE OF A BROAD GEOGRAPHIC DISTRIBUTION OF STUDENTS AND THE DESIRABILITY OF THE INCLUSION OF FOREIGN STUDENTS WITHIN A PREDOMINANTLY AMERICAN STUDENT POPULATION ARE COMMONLY HELD ADMISSIONS OBJECTIVES ACCLAIMED FOR EDUCATIONAL ADVANTAGE.

MORE RECENTLY, PROFESSOR NEWCOMB OF THE UNIVERSITY OF MICHIGAN AND OTHERS HAVE BEEN TRYING TO MEASURE THE IMPACT OF EDUCATIONAL INSTITUTIONS ON STUDENTS' VALUES. IN THE COURSE OF THEIR STUDIES, THEY FIND THAT THE MOST SIGNIFICANT IMPACT ON VALUES RESULTS FROM THE INTERCHANGE BETWEEN STUDENTS NOT IN THE FORMAL CLASSROOM SETTING. ONE CONCLUDES, THEREFORE, THAT THE CHARACTERISTICS OF THE STUDENT BODY ARE CRITICAL IN THE

LEARNING PROCESS THAT TAKES PLACE IN AN INSTITUTION.

TELEVISION, MIGRATION--A NUMBER OF FACTORS ARE COMBINING TO MAKE THE AMERICAN WHITE COMMUNITY INCREASINGLY HOMOGENEOUS, THUS GIVING LESS SIGNIFICANCE TO GEOGRAPHIC DISPERSION AS A CRITERION FOR BRINGING DIVERSITY OF VALUES AND EXPERIENCES INTO THE AMERICAN STUDENT BODY. YET FOR AMERICA THE TASK OF CREATING A SOCIETY THAT CAN ACCOMMODATE AND BUILD ON THE STRENGTH OF ETHNIC DIVERSITY LOOMS EVER MORE IMPORTANT. UNLESS WE BUILD TOWARD RACIAL PEACE, WE INVITE CATASTROPHE. WE NEED CREATIVE, UNDERSTANDING WHITE AND MINORITY LEADERS. THE NEED FOR RACIAL UNDERSTANDING AT HOME IS EVIDENT. IN THE INTERNATIONAL ARENA, WHERE WHITES ARE THE MINORITY, THE ELIMINATION OF AMERICAN RACISM IS EQUALLY URGENT.

ONE CANNOT TRAIN THE LEADERS NEEDED FOR THE FUTURE OR GROPE TOWARD ANSWERS TO RACIAL COMMUNICATIONS IN ALL WHITE EDUCATIONAL COMMUNITIES. EDUCATIONAL COMMUNITIES CAN PRODUCE FUTURE LEADERS ONLY IF WE PROVIDE AN ARENA FOR THE UNDERSTANDING OF DIFFERENT CULTURES AND VALUES--ONLY IF WE PROVIDE AN ENVIRONMENT THAT SMASHES STEREOTYPES. EDUCATIONAL AND SOCIAL ISSUES OF RACE ARE EFFECTIVELY DEALT WITH AS A CONSCIOUS AND UNCONSCIOUS PART OF THE COLLEGIATE EDUCATIONAL AGENDA ONLY IF THERE IS REPRESENTATION

WITHIN THE STUDENT BODY OF THOSE FROM ETHNICALLY DIVERSE BACKGROUNDS, NOT JUST THE STUDENT BODY BUT THE CURRICULUM, THE FACULTY, THE SUPPORT STAFF--ALL MUST REFLECT THE URGENCY WITH WHICH THE EDUCATIONAL COMMUNITY RESPONDS TO THE AMERICAN DILEMMA.

SO FAR MY FOCUS HAS BEEN ON UNDERGRADUATE GENERAL EDUCATION PROGRAMS. THESE SAME POINTS ARE EQUALLY APPROPRIATE FOR THE PROFESSIONAL AND GRADUATE SCHOOLS. I WOULD, HOWEVER, CHOOSE TO AMEND MY STATEMENT SLIGHTLY FOR THESE PARTICULAR EDUCATIONAL SETTINGS.

IN THE FIRST PLACE, THE MISSION OF THESE SPECIALIZED SCHOOLS ARE OBVIOUSLY APT TO BE MORE SPECIFIC, REQUIRE MORE SOPHISTICATED EQUIPMENT FOR TRAINING, AND BE MORE DIRECTLY INFLUENCED BY THE MARKET CONDITIONS FOR A GIVEN OCCUPATION. PUT ANOTHER WAY, THE LIBERAL ARTS COLLEGE HAS FEWER CONSTRAINTS ON NUMBERS THAN THE PLUMBERS APPRENTICESHIP PROGRAM OR THE MEDICAL SCHOOL.

SECOND, THE NEED TO INCLUDE MINORITY GROUP MEMBERS MAY BE MORE URGENT IN ONE FIELD THAN ANOTHER BECAUSE OF THE NATURE OF THE TRAINING PROVIDED.

LET ME ILLUSTRATE WHAT I MEAN BY EXAMPLES. IT IS ESSENTIAL THAT MINORITY GROUP MEMBERS HAVE ACCESS TO THE HIGH SKILLED, WELL PAID JOBS

OF PLUMBING. THE INCLUSION OF BLACKS AS PLUMBERS IS A STEP TOWARD A MORE EQUITABLE SOUNDER DEMOCRATIC SOCIETY AND THE ACQUAINTANCE WITH BLACKS AS PROFESSIONAL EQUALS MAY ASSIST A WHITE TO ELIMINATE STEREOTYPED THINKING. BUT PIPES KNOW NO COLOR. CULTURAL VARIATION INFLUENCES LITTLE THE TREATMENT FOR CLOGGED SINKS.

MEDICINE, SOCIAL WORK, PUBLIC HEALTH, EDUCATION--THE "PEOPLE CARING" CULTURALLY SENSITIVE PROFESSIONS MUST, IN MY JUDGMENT, BE PARTICULARLY SENSITIVE TO THE MIX OF THEIR STUDENT BODY.

IN "PEOPLE CARING" OCCUPATIONS, ONE MUST BE ABLE TO LISTEN AND HEAR THE PERSON NEEDING ASSISTANCE. RESPECT, KNOWLEDGE OF LIFE STYLES, AND THE ABILITY TO SEE EACH PERSON AS AN INDIVIDUAL WITHOUT STEREOTYPE ARE FIRST INGREDIENTS TO HEARING, AND THEREFORE ASSISTANCE. WORKING CLOSELY WITH MINORITY GROUP MEMBERS DURING THE TRAINING PROCESS MAY BE THE MOST EFFECTIVE VEHICLE FOR ASSISTING OTHERS TO HEAR.

TO UNDERSCORE THIS POINT, LET ME BE AUTOBIOGRAPHICAL FOR A MOMENT. IN THE MID-60'S I FOUND MYSELF INVOLVED IN A NUMBER OF WAYS WITH HEALTH CARE DELIVERY. AN OFTEN REPEATED THEME OF THOSE DELIVERING THE SERVICES WAS THAT PATIENTS DIDN'T FOLLOW ORDERS OR COMMUNITIES DIDN'T UNDERSTAND.

THE RECIPIENTS OF THE CARE ON THE OTHER HAND COMPLAINED THAT DIRECTIVES WERE GIVEN WITHOUT KNOWLEDGE OR UNDERSTANDING OF LIFE STYLES, AVAILABLE FOODS AND RESOURCES, OR OTHER INGREDIENTS CRITICAL TO SUCCESSFUL CARE.

TO A GREAT EXTENT, THESE MISUNDERSTANDINGS RESULTED FROM QUESTIONS NEVER ASKED, ANSWERS NOT FULLY UNDERSTOOD OR HEARD, AND A MANNER THAT INTIMIDATED. THE EDUCATIONAL ENVIRONMENT FOR THESE SPECIALISTS HAD OFFERED FEW OPPORTUNITIES FOR EXPERIENCE THAT WOULD SENSITIZE THE FUTURE PROFESSIONALS TO SUCH UNDERSTANDING.

IN ONE CASE WHERE I FOUND MYSELF ON THE VISITING COMMITTEE FOR A SCHOOL OF PUBLIC HEALTH, A COMMITTEE OF US CONCERNED WITH THIS SEVERE COMMUNICATIONS PROBLEM CONCLUDED THAT FOR THE SELF-EDUCATION PROCESS OF PUBLIC HEALTH PROFESSIONALS WE WOULD RECOMMEND THE HAND TAILORING OF INCOMING CLASSES IN THE SCHOOL OF PUBLIC HEALTH TO INCLUDE RACIAL AND ETHNIC MINORITIES, WOMEN WHO WERE RETURNING TO SCHOOL AFTER RAISING A FAMILY, BRIGHT FRESHLY TRAINED YOUTH, AND PEOPLE WHO HAD BEEN IN OTHER AREAS OF MEDICAL CARE. AS YOU CAN SEE, SUCH A MEDICAL ADMISSIONS POLICY WOULD PROVIDE PROFESSIONALS MORE APT TO

SERVICE MINORITY GROUPS, BUT OUR RECOMMENDATION WAS ON THE BELIEF THAT SUCH AN ADMISSIONS POLICY ALSO WOULD IMPROVE THE EDUCATIONAL PROCESS ITSELF FOR ALL INVOLVED. THE COFFEE BREAK WOULD PROVIDE OPPORTUNITY FOR INSIGHTS AND GET PEOPLE BEYOND STEREOTYPIC THINKING. THE FULL PARTICIPATION OF MINORITY MEMBERS WOULD HAVE THE AFFECT OF CHANGING THE CURRICULUM.

IN SUMMARY, WHETHER ONE SPEAKS OF GRADUATE AND PROFESSIONAL OR UNDERGRADUATE EDUCATION, I SEE AFFIRMATIVE ACTION PRINCIPLES AS INEXORABLY INTERTWINED WITH THE EDUCATION PROCESS ITSELF.

THE BAKKE COURT DECISION PERMITS US TO GET ABOUT THE BUSINESS OF EFFECTIVE EDUCATION FOR A DEMOCRATIC SOCIETY.

Barbara W. Newell
September 13, 1978
San Diego, California

BAKKE AND BEYOND

FROM DISCRIMINATION TO AFFIRMATIVE ACTION

Arvo Van Alstyne
Professor of Law and
Vice President-Executive Assistant
University of Utah

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FROM DISCRIMINATION TO AFFIRMATIVE ACTION

by Arvo Van Alstyne
Professor of Law and
Vice President-Executive Assistant
University of Utah

The Bakke decision, for persons of reflective disposition, is circumscribed by subtle ironies. The issue is not new. In 1848, when Harvard College proposed to admit one Negro student, President Edward Everett reportedly responded to a storm of protests by saying that "if this boy passes the [entrance] examinations, he will be admitted; and if the white students choose to withdraw, all of the income of the college will be devoted to his education."

Four decades ago, the thrust of the relevant litigation over professional educational admission standards concerned the validity of institutional policies to exclude under the excuse of "separate but equal facilities," qualified students, from all-white law schools and graduate programs, because they were black. Today, the issue is reversed: may qualified applicants be admitted to graduate and professional education because they are black (or Chicano or Asian or Native American)?

To put the point of Bakke this way, I submit, illustrates how far we, as a society have come -- albeit with all deliberate speed and frustratingly disparate results -- during that period of time. Few persons, however, would be so rash as to suggest that the uneven and halting progress of the past several decades has overcome the preceding centuries of deliberate oppression and calculated indifference to the rights of minorities in our society.

A more visible degree of public sensitivity to racial problems has been developing, however, emanating in part from moral imperatives but perhaps more importantly from demonstrative activism and political initiatives by minority communities throughout the nation. That sensitivity has been manifested in seminal court decisions that have reinvigorated basic human values implicit in constitutional language. It has brought forth epochal legislation, after a century of Congressional indifference, in the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, and the Equal Employment Opportunity Act of 1972. And it has focussed the attention of public officials and educators upon the pragmatic, as well as theoretical, issues of remedies.

In the context of the concerns of the present conference, the remedial debate all too easily degenerated into a semantic squabble revolving about fine-spun distinctions relating to the meaning of such terms as "quotas," "goals," "reverse discrimination," "suspect classification criteria," "affirmative action programs," and "preferential admissions" programs for "disadvantaged" students. The Supreme Court's decision in Bakke, despite its many shortcomings, has at least cut through much of the rhetoric to establish three cardinal points of departure for future progress toward racial justice:

(1) The reservation of a fixed number of seats in the entering class for designated minority candidates to programs which are federally supported violates Title VI of the Civil Rights Act of 1964.

(2) The use of race and ethnicity as nondecisive factors to be considered in a flexible admissions program, which also takes many other circumstances into account, is valid as a means for producing diversity among the students in an educational program that is federally supported.

(3) Race and ethnicity may be used as decisive factors in the admissions process, without violation of the Equal Protection Clause, if responsible legislative, administrative, or judicial bodies have determined that this approach is necessary to remedy specific prior discriminatory practices of the institution.

Beyond these three points, the legal effect of Bakke is clouded. But it is worthy of special note that not one justice disagreed with Justice Powell's point that race and ethnic origin may, at least under some circumstances and for some purposes, be taken into account in the admissions process. On the other hand, it is equally true that not one justice agreed with Justice Powell's views that, on the record before the court, the only asserted objective which would permit such consideration of race was the "student body diversity" objective. Four justices, you will recall, refused to discuss the point, believing it to be irrelevant; four others expressed the view that the Constitution permitted a far more expansive use of racial elements than Justice Powell was prepared to allow.

John F. Kennedy spoke to the nation as President of the United States, on June 11, 1963, the evening following the showdown at

the entrance to the University of Alabama when Governor Wallace stepped aside and permitted two blacks to enter that institution pursuant to a court order. In his address, the President appealed for national support for a comprehensive Civil Rights Act -- legislation that ultimately was enacted the following year as a memorial to his assassination in Dallas. He said, in part:

> ". . . not every child has an equal talent or an equal ability or an equal motivation, but they should have the equal right to develop their talent and their ability and their motivation to make something of themselves. We have a right to expect that the Negro community will be responsible, will uphold the law, but they have the right to expect that the law will be fair; that the Constitution will be colorblind, as Justice Harlan said at the turn of the century."

One of the major lessons of Bakke, however, is that the Constitution need not be colorblind, and that race and ethnic origin are facts of life that cannot and need not be disregarded in the pursuit of social justice. Affirmative action, properly understood not to consist of fixed numerical quotas or ratios but as a vigorous effort to recruit and admit students who are found to be qualified upon assessment of their personal characteristics and experiences, including racial and ethnic background, has been given clear judicial approval. In this sense, Bakke represents, I submit, an opportunity and a challenge to the higher educational community.

To say this is not to overlook or minimize the difficulties presented by Bakke. There are many relevant legal and constitutional issues still dangling, inextricably intertwined into a Gordian knot which only future litigation, or possibly legislation, can cut through. Let me review a few of these points:

(1) The proper interpretation of Title VI is still unresolved by Bakke. It is not clear whether the decision, based on Title VI, applies to educational programs that receive no direct federal support, merely because other programs within the same institution do receive such support, or federal financial aids are available to students in attendance there. This issue, which may be of critical importance in assessing the impact of Bakke, is one on which reasonable persons could differ. Analogous questions have arisen under Title IX of the Education Amendments of 1972, which bars sex discrimination in federally funded programs. The answers are not yet clear. But if Title VI is accorded a narrow application, the underlying constitutional issue will have to be faced by public institutions, while private colleges and universities will apparently be free to initiate racial quota admissions policies in connection with programs that are not federally funded. The Court also left unresolved the issue whether there is a private right of action available under Title VI.

(2) Affirmative action admission programs of many differing types may well be valid under Bakke. Indeed, one of

the major principles that emerges from the several opinions of the justices is that the informed discretion of academic officers in assessing the relative qualifications of students will be accorded substantial deference by the courts, even though those judgments may be subjective and may weight the various factors considered in a differential manner. In effect, Bakke seems to suggest a judicial tolerance for more discretion and less rigidity in the admissions process, thus paving the way for imaginative and more flexible approaches short of strict racial quotas.

(3) If an institution wishes to adopt a racially sensitive admissions program, it must be prepared to articulate the precise manner in which the structure and criteria used serve the stated objectives of the program. Justice Powell rejected three of the objectives advanced for the Davis special admission program -- namely (a) increasing the proportion of minorities in the medical profession; (b) offsetting the effects of societal discrimination against designated minorities, and (c) increasing the number of physicians practicing in underserved communities. He accepted only the educational diversity objective as a permissible one. His opinion, however, is not that of the Court, and other objectives, if properly supported by persuasive evidence, might well carry the day in other cases, especially if they are supported by findings of

fact and need made by duly constituted legislative or administrative agencies.

(4) Bakke appears to suggest that the greatest opportunity for vigorous affirmative action programs lies in legislative hands. The Brennan group of four on the Court clearly supported the propriety of quota-type plans adopted by responsible educators and designed to redress past discrimination, either institutional or societal. Justice Powell refused to go this far, but he explicitly recognized that even quota-type admission programs might be permissible if they emerged from properly structured administrative, legislative, or judicial findings of illegal past discrimination. Such findings may well have evidentiary support in many cases. Justice Powell's concern, it seems, is related not so much to the absence of supporting proof (after all, societal discrimination generally provides the milieu for legal discrimination); rather it relates to the need, in his view, to assure a focussed consideration of the issues by a broadly representative body, a structured approach that will assure that the interests of majority group members are not overlooked in the zeal to redress injuries to victimized minority persons. As Justice Powell noted, "isolated segments of our vast governmental structure are not competent to make these decisions, at least in the absence of legislative mandate and legislatively determined criteria."

(5) Bakke provides a broad spectrum of possible institutional responses to the plight of the minority applicant to graduate and professional programs. At one extreme, a policy of indifference seems legally permissible; affirmative action in higher education -- as distinguished from nondiscrimination -- is not a legal obligation. At the other extreme, racial quotas, buttressed by statutory authorizations, broadly structured fact-finding processes, and clearly articulated findings supported by adequately marshalled evidence, appear capable of surviving judicial review. The intermediate ground is occupied by racially sensitive, flexible, multi-factored, affirmative action programs voluntarily developed and pursued, which emphasize the personal rather than the group characteristics of applicants. In determining the point on this spectrum at which particular institutional policies should be located, academicians should be mindful that inaction is likely to invite legislative reaction. The Congress which enacted Title VI could equally well mandate rigorous racially sensitive admissions programs which, in view of Bakke, would qualify for judicial authentication.

One other issue of major consequence, which underlies all of the other issues in Bakke, relates to our tendency in education to rely upon quantitative measures of qualities which, so far as we know, may actually be unquantifiable. Several studies, for example, appear to document the fact that the MCAT test, used

widely in medical school admissions practices, has little relevance to successful performance in the curriculum or in medical practice. Justice Douglas' dissent in the De Funis case marshalled evidence that suggests a measure of cultural bias associated with the Law School Admission Test. We desperately need, I suggest, better data on testing and evaluating academic qualifications and for assessing other important human qualities relevant to professional education and practice, such as creativity, motivation, integrity, perseverance, and compassion. Until such data are available, we must accept the challenge of Bakke: a good faith subjective evaluation of the total person of each candidate, without giving controlling significance either in a positive or negative direction to race or ethnicity, is regarded as a proper, reliable, and presumptively accurate description of acceptable affirmative action admission procedures.

Bakke has cleared the air a bit. The legal guidelines, while not fully defined, are less murky. The real challenge is what we will do, as educational leaders, in moving forward to advance the educational needs of those to whom equal opportunity has been denied in the past. As Justice Marshall's opinion in Bakke reminds us, ". . . meaningful equality remains a distant dream for the Negro. . . . In light of the sorry history of discrimination and its devastating impact on the lives of Negroes [and, I may add, of other minorities as well], bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will

forever remain a divided society."

George Bonham, editor of Change magazine, recently summarized the challenge of Bakke in these words:

> "What we must ultimately get to in this country, even if it takes another generation, is an open and honest exercise in the pursuit of both equal opportunities and the full expectation of equal performance and accomplishments. These twin yardsticks will ultimately measure the attendant risks and tranquillities of a society that has finally grown up, that practices what it preaches in its much cherished public documents. It is only simple justice, and if Bakke helps carry us even a step toward that end, it will have been worth all the hopes, realized or lost, that have been raised for it."

BAKKE AND BEYOND

THE DECISION AND ITS BACKGROUND

Robert B. McKay
Director
The Justice Program of the Aspen Institute

September 13, 1978
San Diego, California

The conference is cosponsored by the Inservice Education Program of the Education Commission of the States and The Justice Program of the Aspen Institute.

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BAKKE AND BEYOND

The Decision and Its Background

Robert B. McKay*

When the Education Commission of the States and the Justice Program of the Aspen Institute inquired in April of this year into the potential impact on higher education of the various possible decisions the Supreme Court might reach in the Bakke case, I suggested that this is "the case with everything, or at least something for everyone."

That was two months before the decision. Now that we have had time to reflect on the decision itself, I reassert that opinion even more strongly. On June 28, 1978, the world was treated to a judgment with two major holdings, several minor conclusions, and six separate opinions. (Only Chief Justice Burger and Justices Rehnquist and Stewart chose not to add to the confusion, having silently joined in the supremely technical position advanced by Mr. Justice Stevens.)

The "something for everyone" aspect was not diminished by the fact that all participants in the proceeding could claim something of a victory.

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Allan Bakke was certainly a winner. He got the only thing he ever asked for - an order admitting him to the University of California Medical School at Davis, where presumably he sits in class right now. But many of his principal supporters may have been less pleased with the other half of the holding, that race and ethnicity can be taken into account in higher education admissions, which I believe to be the major outcome of the case.

Although I am already ahead of my story, which deserves an orderly recounting of facts, issues and holdings, I hope you will allow me to delay a bit longer that proper unfolding while I report some of my own biases to help you judge the account which follows.

You should understand my own deep commitment to affirmative action in higher education. As a law school dean between the mid-1960s and the mid-1970s I vigorously encouraged efforts to recruit and admit minority students to a law school which had gone almost all white in the course of our rather strict adherence to admission standards that were useful - in a period then and now of 10 to 15 applicants for every place - because based on so-called objective factors such as grade point average (GPA) and Law School Admission Test scores (LSAT). Moreover, I was the first chairman of the Association of American Law Schools (AALS) Committee on Minorities. So, when Bakke came along it was natural that I should be one of the signers of the brief of the AALS.

By the spring of 1978 I had persuaded myself that the Davis program was not only valid - however far to one end of the spectrum - but that the Supreme Court might well uphold it. As a matter of fact, I was not far off base, since

four agreed with that view, while four held the Davis program invalid only on statutory grounds without passing on the constitutional question. Only Mr. Justice Powell concluded that the Davis program was unconstitutional.

Against that background you may be surprised to hear that I consider the Supreme Court decision in Bakke to be a considerable victory, although not all academics agree. For example, during a panel on Bakke at the American Bar Association meeting in New York City in August a fellow panelist was Dean Louis Pollak of the University of Pennsylvania Law School, who was a major contributor to the brief in support of Davis on behalf of four universities, Harvard, Pennsylvania, Stanford and Yale. By the date of the panel in early August he had been confirmed as a United States District Court Judge for the Eastern District of Pennsylvania. Although he was not to be sworn in until September, Dean/Judge Pollak took advantage of his soon-to-be-assumed judicial mantle to convict me of optimism because of my analysis of the decision. Since I have found nothing in the statute books about the penalty for optimism, I have written Judge Pollak to ask about applicable procedures. Perhaps he will sentence me to write 1000 times on the blackboard my reasons for optimism. It is in that spirit that I offer my views on Bakke.

My other experience, arising out of the same panel, came in a letter from a member of the audience, another academic. After friendly acknowledgment of my presumed commitment to affirmative action, he chided me for having gone over to the enemy. The reference was to my remark during the panel discussion that the decision knocking out the Davis program made it possible for those of

us who supported affirmative action generally and the Davis program specifically to join forces with those who opposed the Davis program but supported affirmative action by other means. I believe my well meaning critic was wrong, and my principal purpose today will be to try to persuade you that it is now possible to forge a broad-based cooperative effort in behalf of recruitment and admission of minority applicants to institutions of higher education. I hope that does not sound too Panglossian for your taste. While it may not be the best of all possible worlds, I think it can be made to work very well.

The Facts. And so at last I come to my assigned task. Who was Allan Bakke, and what momentous constitutional issues were triggered by the decision to reject his application to the Davis Medical School?

Allan Bakke received a degree in mechanical engineering from the University of Minnesota in 1962. After graduate study there and service in the United States Marine Corps, he completed a master's degree in mechanical engineering at Stanford University in 1970. By 1972 he had completed the prerequisites for medical school.

In 1972 Allan Bakke applied for admission to two medical schools and was rejected by both. In 1973 he applied to, and was rejected by, 11 medical schools. In 1974 Davis turned down his second application to that school despite the fact that his premedical school grade point average and his Medical College Admission Test (MCAT) scores were higher than most or all the 16 minority applicants who were accepted.

The Davis Program for medical school admissions operated on two levels. In a class of 100 the general admissions program made decisions for 84 places, based on a complex formula of GPA, MCAT, interviews and even some preferences, based on geography or other special factors. Although race and ethnic background were not taken into consideration, several minority students were admitted in 1974 as part of the general admissions program.

The Task Force Program, separately administered, was ostensibly a program to select 16 "disadvantaged" applicants. In practice, the places were almost invariably awarded to applicants of a minority race or specified ethnic background.

When Allan Bakke was denied admission to Davis in 1974, he sued in the California state courts, alleging violation of the equal protection clause of the 14th amendment to the United States Constitution, a similar provision in the California Constitution and Title VI of the Civil Rights Act of 1964, which bars discrimination on grounds of race, color or national origin in federally assisted programs.

The trial court upheld Bakke's claim on all the grounds he had urged, but conditioned his admission on proof that he would have been admitted if there had been no Task Force Program. The Supreme Court of California also held the Davis program invalid as a violation of the United States Constitution, but without reference to the state constitution or federal statute. Significantly, it shifted the burden of proof on the admissions decision from Bakke to the university, ordering his admission unless the university could establish that he would not have been admitted if there had been no Task Force Program.

When the university conceded that it could not meet that challenge, the California Supreme Court ordered Allan Bakke admitted. That order was stayed by the Supreme Court of the United States when it agreed to review the case in a brief order in February 1977. After the case had been argued in October 1977, the Court asked for additional briefs on the applicability of Title VI of the Civil Rights Act to the case.

Meanwhile, the case has attracted the highest level of interest of any Supreme Court case in recent years. More than 50 briefs amici curiae were filed by early June 1977. Additional briefs were filed when the United States subsequently entered the case in qualified support of the university. The United States brief argued that it is permissible for a university to adopt a "minority-sensitive" program, but that the record in this case was not sufficient to establish whether the Davis program met the recommended test or transgressed the permissible. Accordingly, the brief asked the Court to remand the case to the California courts for further fact-finding.

The Decision. When Justice Lewis Powell announced the judgment of the Court in Bakke, it is almost accurate to say that he spoke as a majority of one, for he alone held the prevailing view on both principal issues:

First. Race and ethnic background may be considered along with other factors in higher education admissions decisions. In this he was joined by Justices Brennan, White, Marshall and Blackmun (in an opinion by Justice Brennan), reversing the California Supreme Court on the point.

Second. Allan Bakke must be admitted to the medical school of the University of California (Davis) because the procedures pursuant to which he was denied admission are invalid. In this, Justice Powell was joined by Chief Justice Burger and Justices Stewart, Rehnquist and Stevens (in an opinion by Justice Stevens). On this point the judgment of the California Supreme Court was affirmed. In the oral presentation from the bench, Justice Powell, who was fully aware of the ambiguities of the situation, said: "I will now try to explain how we divided on this issue. It may not be self-evident."

Because the Supreme Court of the United States affirmed in part and reversed in part the judgment of the California Supreme Court, the not uncommon initial reaction was to describe the judgment as "Solomonic" or "a historic compromise."

Careful review of the opinions of Justice Powell and the five others who concurred and dissented or wrote separate opinions suggests that the final result is not a compromise judgment; the educational baby is not threatened by a Solomonic sword. The central message was indeed an approval of affirmative action. The Davis program was rejected, not because race and ethnicity were taken into account in making admissions decisions, but because of the two-track character of the program. Sixteen seats in the entering class of 100 were reserved for blacks, Chicanos, Orientals and Native Americans; no others were eligible to compete for those places.

The Powell prose was cool and the language was measured, particularly when compared with the opinion for the Brennan group, or with the even stronger

language of Mr. Justice Marshall and of Mr. Justice Blackmun. Mr. Justice Brennan, for example, said:

> Government must take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

Mr. Justice Marshall, reviewing the history of racism in the United States, recalled that

> during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a state acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

The Marshall opinion, for all its passion, is oddly incomplete. There is no reference to any racial or ethnic group except blacks. Probably he meant to include others in his sweeping condemnation of racism. But the emphasis on slavery and specific mistreatment of blacks does not quite fit.

Probably the most eloquent, certainly the most widely quoted, is the statement of Mr. Justice Blackmun.

> In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must first treat them differently. We cannot - we dare not - let the Equal Protection Clause perpetrate racial supremacy.

Rhetoric, however, does not always carry the day. It is necessary, therefore to return to the cautious argument of Mr. Justice Powell as he carefully threaded his way between the two blocks of four, who disagreed with each other in crucial respects, but with each of whom Powell was able somehow to

find common ground. His task was to find reasons to disapprove of the Davis Program without striking down all race-sensitive admissions, and thus by implication all affirmative action programs.

The first step was to conclude that the use of race is a suspect classification, which can be justified only by showing that the state's purpose "is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its interest." Presumably, all members of the Court agree with that proposition, but the Brennan group differ on the permissible purposes, and the Stevens group do not reach the issue because of their narrow statutory perspective.

Justice Powell noted that the University of California supported the special admissions program on four bases: (1) "reducing the historic deficit of traditionally disfavored minorities in medical schools and the medical profession"; (2) countering the effects of societal discrimination; (3) increasing the number of physicians who will practice in communities currently underserved; and (4) obtaining the educational benefits that flow from an ethnically diverse student body.

The first three he rejected as insufficient to justify a minority-sensitive admissions program because to prefer "members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." Thus, he rested the entire justification for minority-sensitive admissions on the educational benefits to be achieved from an ethnically diverse student body. As Jack

Greenberg, Director-Counsel of the NAACP Legal Defense and Educational Fund sardonically notes, "the Powell opinion justifies consideration of race in admissions to benefit the larger, white community (!) although, incidentally, it also benefits blacks."

The short of it seems to be that race and ethnic background may be taken into account in university admissions decisions, along with other relevant factors, so long as the "program treats each applicant as an individual in the admissions process." With favorable citation of the present programs at Harvard and Princeton, which do just that, Justice Powell demonstrates that he has no intention of shutting down, or even reducing, current good faith efforts to bring increased numbers of minority group members into higher education.

Two kinds of diversity are involved in minority-sensitive admissions programs. (We can now reject those odious phrases "reverse discrimination" and "reverse bias.") One is the educational diversity to which Justice Powell refers in the above-quoted passages. A proper education objective is served by a diverse student body. As noted in the description of the Harvard College Admissions Program (quoted in the appendix to the Powell opinion):

> The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements.

Accordingly, again quoting:

> Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students,

> minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.
>
> * * * * *
>
> At the same time the Committee is aware that if Harvard College is to provide a truly heterogeneous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers.

The second kind of diversity promoted by increased minority representation applies particularly to the graduate and professional schools, which can better serve the public interest by training individuals from a wide variety of backgrounds, necessarily including racial and ethnic minorities. The Brennan group recognize the necessity of taking into account past societal discrimination in order to accomplish this result. Powell does not seem to agree, and the Stevens group is silent on this, as on most issues.

In any event, it is inconceivable that professional schools would willingly return to the time only ten or fifteen years ago when they were nearly all white (and nearly all male). If that disastrous reversion can be avoided only by taking race into account in the admissions decision, it behooves graduate and professional schools to take the necessary steps to do so.

That indeed has been the response of the higher education community, and that is what the Bakke case is principally about. Specifically, the case involved the admissions program at Davis, but fundamentally it was about minority-sensitive policies in higher education. While many of us defended the Davis program in order to protect the more general principle which it was intended to serve, many of those same supporters are willing to abandon that

program, which was by no means representative of special admissions programs because located instead at the extreme end of the spectrum.

Because the Davis program was so untypical, many members of the higher education community were distressed that it should serve as the test case. The fear was that the broad principle might be jeopardized when measured against an atypical system. In retrospect it may even have been useful to look at the problem from that almost distorted perspective. It became almost easy to reject the most extreme attempt to right the balance of past wrongs while preserving the principle of good faith efforts to accomplish the same result by less drastic means.

Significantly, few schools have adopted admissions programs comparable to the one at Davis. The mainstream of higher education should be able to continue without interruption despite the damming (and damning) of a small tributary.

The Bakke judgment and its 154 pages divided among six opinions will be criticized, as it has been already, for failing to provide crisp answers to all the questions that were or might have been put. But ambiguity has its uses. The Supreme Court of the United States is not equipped to act as the board of trustees for every college and university in the country. In this spirit I wish to suggest some of the strengths of the judgment and to identify some of the questions left for later resolution.

First. The most important proposition is that the Court has now resolved the terrible doubts that have long overhung all race-conscious admissions programs. No longer need admissions officers worry whether race may properly be

considered. Every college and university, once it has re-examined its program to ensure compliance with the Court's guidelines, will now be able openly to state what it intends. Justice Powell is surely right in saying that the majority-approved standard for application of race-conscious factors is not just a means of doing covertly what Davis did openly. There is a difference between the Davis two-track system and the single-track admissions programs favorably cited by Justice Powell. Justice Blackmun makes the same point. Although he (and I) would have found the Davis program valid, he agrees that minorities can prosper under the majority formulation. A program such as that at Harvard "where race or ethnic background is only one of the many factors, is a program better formulated than Davis' two-track system."

Second. The judgment is likely to meet general approval, a not inconsiderable virtue where the subject is as emotion-laden as this. Justice Powell quietly noted the Court's sensitivity to this question in footnote 53.

> There are also strong policy reasons that correspond to the constitutional distinction between petitioner's preference program and one that assures a measure of competition among all applicants. [The Davis] program will be viewed as inherently unfair by the public generally as well as by applicants for admission to state universities.

Opponents of minority-sensitive programs can stress the fact that Bakke is ordered admitted and that the Davis program, publicly identified under the pejorative term of "reverse discrimination," has been invalidated. Meanwhile, the universities and careful students of the opinions recognize, not only that they can live with the result, but that they have achieved essentially what they wanted.

In this connection it must be remembered that no member of the Court stated that race and ethnic background could not be taken into account. Five members of the Court specifically said that race is a relevant factor. Justice Stevens, writing for himself, Chief Justice Burger and Justices Stewart and Rehnquist, concluded, on the basis of a restrictive reading of the order of the California trial court, that the issue of a race-conscious admissions policy was not before the Court.

> It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate.

Based on that narrow reading of the record, Justice Stevens concluded that Bakke had been excluded from consideration for one aspect of the Davis admissions program because of his race and therefore in violation of Title VI of the Civil Rights Act of 1964. Reading Title VI to have a different and possibly more restrictive meaning than the equal protection clause of the fourteenth amendment, he therefore made no judgment on the constitutional question or even on the question whether a minority-sensitive admissions program different than the one at Davis would be valid.

The bottom line is that no member of the Court has denied the permissibility of taking race into account for some purposes. It seems to me unlikely that any member of the Court will subsequently adopt the extreme position that race and ethnicity can never be taken into account in the admissions process.

Third. If race may be taken into account to some extent, the remaining question is: How much? The strength of the present decision is that it leaves the preliminary shaping of answers to the education community. If there are individuals who wish to challenge programs that seek to comply with the Bakke message, we can hope the Court will be in no hurry to define rigidly the contours of what is permitted and what is forbidden.

In declining to prescribe admission standards for medical schools and thus by implication for other units of higher education, the Court has wisely invited the education community to devise "good faith" experiments to determine what best meets the needs of the education community and of the public interest at large. The new opportunity is to focus on means rather than ends. It may be hoped that the period of legal inquiry is largely past. The emphasis now should be on the education community to recover the almost-lost initiative in devising ways to bring increased numbers of minority group members into the programs of the selective institutions.

Each institution is invited to examine its own educational mission and to determine the educational impact of bringing - or failing to bring - minority groups into full partnership in that undertaking. But recall that no institution is required to do anything. The question now is whether institutions of higher education will indeed respond to the invitation - it is no more than that - to ensure the inclusion of minorities in the mainstream of higher education.

Important and difficult questions remain. It is the purpose of this seminar to ask how institutions of higher education should answer such questions as these:

First. In reviewing existing programs and devising modifications, to what extent can numbers be taken into account? Justice Powell brushed aside as a "semantic distinction" the asserted difference between quotas and goals. But neither he nor any other member of the Court denied that numerical objectives may be permissible - even inevitable. The "approved" Harvard program recognized that "the rich diversity of the United States . . . cannot be provided without some attention to numbers."

Second. What are permissible admissions criteria? If institutions of higher education are to reduce reliance on grade point averages and test scores, what other factors may be taken into account, and to what extent? Justice Powell, specifically recognizing that "race or ethnic background may be deemed a 'plus' in a particular applicant's file," noted that other qualities could be taken into account such as

> exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.

It is, I think, significant, that he twice cited favorably the work of Winton Manning, "The Pursuit of Fairness in Admissions to Higher Education," in Carnegie Council on Policy Studies in Higher Education, Selective Admissions in Higher Education (1977). In short, so-called "soft criteria" may - and should -

be taken into account. It is more difficult to base admissions decisions in part on subjective data. But that is now the challenge and the opportunity.

Third. What is the definition of a "minority" applicant? Recall, for instance, that the "Negro" petitioner in Plessy v. Ferguson (1896) was only one-sixth black. Why black, not white? How are we to classify those who bear Hispanic surnames only by the chance of marriage without linguistic heritage? For the time we may have to continue blunt determinations, but the issue cannot be indefinitely postponed.

Fourth. What is the impact on Bakke on financial aid and other special support programs intended to aid minority students in achieving their educational goals? The federal government has taken the lead in providing such benefits, but substantial questions remain.

The encouraging aspect of the reaction to Bakke is that the higher education community appears to be seeking ways to regain the initiative that was perhaps lost in recent years, to find the best ways to attract, admit and graduate persons from those groups in our pluralistic society who are seriously underrepresented in higher education today.

Important assistance is offered from diverse sources. The six regional seminars, of which this is one, offer an opportunity for the principal decision-makers to talk out the issues. The American Council on Education and the Association of American Law Schools have developed an excellent analysis. The American Bar Association, as well as other professional organizations, have urged renewed effort. Alternative models from present practice have

been reviewed by Messrs. Alexander Astin, Bruce Fuller, and Kenneth C. Green. The Ford Foundation, along with other not-for-profit organizations, has provided guidance and support.

The will is there; the way must be found. We are on the road to renewed discovery that the Constitution need not be color blind and that justice need not be blindfolded.

BAKKE AND BEYOND

SUMMARY OF REMARKS

Luis Nogales
Vice Chairperson
California Postsecondary Education Commission

September 13, 1978
San Diego, California

The conference is cosponsored by the Inservice Education Program of the Education Commission of the States and The Justice Program of the Aspen Institute.

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SUMMARY OF REMARKS OF LUIS NOGALES
VICE CHAIRPERSON, CALIFORNIA POSTSECONDARY
EDUCATION COMMISSION

1. The significance of race in American life and the use of race, within certain parameters in admissions decisions has been affirmed.

2. The legal questions are behind us. The major issue facing colleges and universities is designing procedures and institutional environments that take into account the need to redress the underrepresentation of educationally disadvantaged ethnic groups in post-baccalaureate educational programs and in the professions.

3. Returning to the status quo--because the Courts have upheld the admissions procedures in effect at many institutions--is not sufficient. The status quo is inadequate in terms of overcoming underrepresentation. We must recapture our sense of momentum and our sense of urgency.

4. The same minority groups that are underrepresented in graduate and professional programs are the most underserved in critical human service areas, such as health care and legal assistance. Health care in our inner-city and rural communities, as measured by ratios of physicians to population, is dramatically deficient and reflects the problem of maldistribution of services. The communities experiencing these deficiencies have more illness, higher infant mortality, and less contact with state and national averages. With respect to legal services, it has been estimated that only 15% of the legal needs of the poor are being met and that less than .5% of all lawyers work full-time with the nation's poor.

5. The post-Bakke agenda:

   First, we must recognize and take steps to counteract

   --the negative psychological effects of the case and of the two years affirmative action programs were in limbo while the case was before the courts. Reaffirmations of commitment by governors, legislatures, state postsecondary education commissions and colleges and universities are needed.

--State postsecondary education commissions should take responsibility for disseminating accurate information regarding the case.

--Legislatures and state commissions should make explicit statements of the substantial state interest in overcoming underrepresentation in educational programs and in achieving better distribution of human services.

--Finally, while the establishment and implementation of admissions criteria is a legal and professional responsibility of institutions and departments, funding and reviewing agencies at the state level should require those responsible to do the following:

1. Demonstrate that admissions policies take into account the human services needs of underserved communities and that efforts are made to seek out and to admit qualified students most likely to address those needs in their professional careers;

2. Demonstrate that specific admissions criteria are sensitive to unmet human services needs, and that such needs are considered when opportunity is allocated among qualified applicants; and

3. Demonstrate that concerns for the distribution and effectiveness of human services are taken into account.

6. These suggestions are starting points for developing the post-Bakke agenda.

BAKKE AND BEYOND

FROM DISCRIMINATION TO AFFIRMATIVE ACTION

Vernon E. Jordan, Jr.
President
National Urban League

September 19, 1978
New York City, New York

The conference is cosponsored by the Inservice Education Program of the Education Commission of the States and The Justice Program of the Aspen Institute.

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ADDRESS BY
VERNON E. JORDAN, JR.
PRESIDENT
NATIONAL URBAN LEAGUE
AT
INVITATIONAL REGIONAL SEMINAR:
"BAKKE AND BEYOND"
NEW YORK CITY
SEPTEMBER 19, 1978

FROM DISCRIMINATION TO AFFIRMATIVE ACTION

I MUST ADMIT THAT WHEN I READ THE TENTATIVE PROGRAM FOR THIS SEMINAR MY EYE WAS CAUGHT BY SOMETHING CALLED "BAKKE SLIDE SHOW." BUT I READ IT QUICKLY, AND WHAT REGISTERED IN MY MIND WAS: "BAKKE SIDE SHOW."

PSYCHOLOGISTS TELL US THAT SIMPLE MISTAKES ARE NEVER JUST SIMPLE; THEY REVEAL SOMETHING ABOUT OUR ATTITUDES. AND IT WAS PERFECTLY NATURAL FOR ME TO READ THAT LINE OF TYPE AS "BAKKE SIDE SHOW," BECAUSE THAT IS INDEED WHAT THE BAKKE CASE BECAME, AND CONTINUES TO BE — A CIRCUS SIDE SHOW DIVERTING US FROM THE REAL ISSUES OF HOW TO MAKE OUR SOCIETY MORE JUST AND MORE EQUAL.

FROM THE BEGINNING, THE BAKKE CASE WAS LOADED WITH THE FREIGHT OF SCARE WORDS AND MISINFORMATION. "REVERSE DISCRIMINATION" HAS BECOME A COMMONLY ACCEPTED PHRASE, DESPITE THE FACT THAT 99 AND NINE-TENTHS PERCENT OF ALL DISCRIMINATION IN AMERICA TODAY IS BY NO STRETCH OF THE IMAGINATION, "REVERSE."

SOME OF THE DISTORTIONS IN THE PUBLIC PERCEPTION OF THE BAKKE CASE ARE CLEARLY THE RESPONSIBILITY OF THE MEDIA. THE MEDIA PERSONALIZED THE CASE FROM THE BEGINNING, FOCUSING ON BAKKE HIMSELF, INSTEAD OF ON THE ISSUES INVOLVED. WEEKS BEFORE THE SUPREME COURT'S DECISION WAS ANNOUNCED, FRED FRIENDLY WROTE AN OP ED PAGE ARTICLE FOR THE NEW YORK TIMES SUGGESTING THAT THE COURT GIVE ADVANCE NOTICE WHEN COMPLEX CASE DECISIONS ARE TO BE HANDED DOWN, SO THAT THE MEDIA COULD BETTER PREPARE THEMSELVES. WELL, THE DECISION DATE WAS A SUBJECT OF RUMOR FOR WEEKS — THE PRESS HAD PLENTY OF TIME. AND THE RESULT WAS A CONTINUATION OF SENSATIONALIZED STORIES AND MISLEADING HEADLINES SUCH AS "BAKKE WINS."

NONE OF THIS WOULD BE ESPECIALLY IMPORTANT, EXCEPT FOR STUDENTS OF JOURNALISM, IF IT WERE NOT FOR THE FACT THAT THE MOST IMPORTANT ELEMENT IN THE BAKKKE CASE IS THE WAY PEOPLE PERCEIVE IT. IT IS NOT WHAT THE COURT SAID THAT WILL AFFECT BLACK YOUNG PEOPLE TRYING TO ENTER COLLEGE, BUT WHAT PEOPLE <u>THINK</u> THE COURT SAID.

AND THAT, IN TURN, HINGES ON WHAT THEY WANT TO THINK. WE OFTEN HEAR WHAT WE WANT TO HEAR; WE OFTEN PERCEIVE THINGS IN WAYS WE WISH THEY WERE.

SO ALTHOUGH THE COURT SAID THAT RACE MAY BE A FACTOR IN THE ADMISSIONS PROCESS, MANY PEOPLE, WITH THOSE HEADLINES OF "BAKKE WINS" STILL IN THEIR HEADS, THINK OTHERWISE.

THAT KIND OF PUBLIC CONFUSION IS DANGEROUS. THE FACT IS THAT THE COURT, IN EFFECT, UPHELD MOST, PERHAPS 90 PERCENT, OF AFFIRMATIVE ACTION PROGRAMS NOW IN EXISTENCE. AND EVEN THOSE UNDER A SHADOW CAN EASILY BE BROUGHT TO CONFORMITY WITH THE COURT'S READING OF THE CONSTITUTION.

THE REAL QUESTION IS WHETHER THEY WILL BE. THE REAL PROBLEM IN THE WAKE OF Bakke IS WHETHER CORPORATE AND EDUCATIONAL OFFICIALS WILL SEIZE ON THE AMBIGUITIES OF THE Bakke DECISION TO WEAKEN OR EVEN ABANDON THEIR AFFIRMATIVE ACTION COMMITMENTS.

IT WOULD BE NAIVE TO SUPPOSE THAT AFFIRMATIVE ACTION IS AN ENTIRELY VOLUNTARY RESPONSE TO INCLUDE PEOPLE ONCE EXCLUDED. QUITE THE CONTRARY! AFFIRMATIVE ACTION PROGRAMS HAVE COME ABOUT ONLY BECAUSE OF THE INSISTENT PRESSURES OF BLACK PEOPLE AND THEIR ALLIES, AND ONLY BECAUSE SUFFICIENT PRESSURE WAS BROUGHT TO ENACT LAWS AND COMPLIANCE MECHANISMS MANDATING BLACK PARTICIPATION IN AMERICAN INSTIUTIONAL LIFE.

NO ONE SHOULD DELUDE HIMSELF INTO THINKING THOSE LAWS WERE NOT NECESSARY. FOR ALL THE TALK ABOUT "QUOTAS," BLACK PEOPLE HAVE BEEN VICTIMIZED BY NEGATIVE QUOTAS THROUGHOUT OUR HISTORY. AND EVEN WHEN THE BARRIERS OF OUTRIGHT DISCRIMINATION AGAINST BLACKS WERE LIFTED, THEY WERE OFTEN MERELY REPLACED BY SUBTLE, SUPPOSEDLY NEUTRAL BARRIERS.

THAT HELPS EXPLAIN WHY WE HAVE ABSOLUTELY NO FAITH AT ALL IN THE SO-CALLED MERIT SYSTEM. THE MERIT SYSTEM WAS INVOKED TO KEEP BLACKS OUT, ON THE BASIS OF TEST SCORES AND GRADE AVERAGES. BUT THE COLLEGIATE MERIT SYSTEM ALWAYS SEEMED TO FIND ROOM FOR C STUDENTS WHO COULD CATCH A FOOTBALL OR HAVE THE GOOD SENSE TO BE BORN INTO THE FAMILY OF A WEALTHY ALUMNUS. THE FEDERAL CIVIL SERVICE, SUPPOSEDLY A MODEL OF "MERIT" INCLUDES PROVISIONS FOR A DISCRIMINATORY LIFETIME VETERANS PREFERENCE. A CONGRESS OBSESSED WITH ATTACKING AFFIRMATIVE ACTION FOR MINORITIES HAS RECENTLY RENEWED THE VETERANS PREFERENCE.

BUT THE PLAIN FACT IS THAT EVEN A MERIT SYSTEM BASED SOLELY ON TEST SCORES IS INADEQUATE AS A SELECTION MECHANISM. TESTS HAVE NOT BEEN DEVISED THAT CAN ACCURATELY PREDICT FUTURE SUCCESS. THEY ARE A MECHANICAL RESPONSE TO A PROBLEM THAT BREEDS PROBLEMS OF ITS OWN.

OUR SOCIETY SIMPLY DOES NOT AFFORD ENOUGH OF ITS CITIZENS OPPORTUNITIES TO GET A JOB OR AN EDUCATION, AND TESTS ARE THE MEANS BY WHICH IT EXCLUDES ITS SURPLUS PEOPLE -- MOST OFTEN THOSE WHO ARE BLACK AND POOR. MEDICAL SCHOOL AND LAW SCHOOL APTITUDE TESTS CAN'T PREDICT WHICH STUDENTS WILL MAKE GOOD DOCTORS OR LAWYERS. AND INCREASINGLY, JOB TESTS MEASURE CONFORMITY RATHER THAN SKILLS.

A FEDERAL JUDGE IN BRIDGEPORT RECENTLY THREW OUT THAT CITY'S TESTS FOR FIREMEN. WHY? LET ME READ YOU SOME QUESTIONS ON THE TEST:

"LABEL THE FOLLOWING PROPOSITIONS TRUE OR FALSE:

"PHILOSOPHICAL QUESTIONS ARE A WASTE OF TIME."

"I CAN'T SEE HOW INTELLECTUALS GET PERSONAL SATISFACTION FROM THEIR IMPRACTICAL LIVES."

"WHEN I WAS A CHILD, I SHOWED NO INTEREST IN BOOKS."

A "TRUE" ANSWER ON ALL OF THOSE WAS MARKED CORRECT.

NOW WHAT DOES THAT HAVE TO DO WITH FIREFIGHTING? TESTS LIKE THAT MEASURE CONFORMITY TO VALUES THAT MAY IN THEMSELVES BE ANTI-SOCIAL.

THE BRIDGEPORT TEST MAY BE AN EXTREME INSTANCE, ESPECIALLY WHEN MEASURED AGAINST VARIOUS ENTRANCE EXAMS FOR COLLEGES AND UNIVERSITIES, BUT THE BARE TRUTH IS THAT TESTS ARE DEFECTIVE MEASURING INSTRUMENTS OF POTENTIAL.

THEIR FLAWS ARE SUCH THAT WE CAN SAFELY SAY THAT A "MERIT SYSTEM" IS A DISTANT DREAM, IF INDEED, IT IS POSSIBLE AT ALL. EVEN THE MOST CAREFULLY DESIGNED TEST WILL TIP THE SCALES IN FAVOR OF THE CHILDREN OF AFFLUENT FAMILIES TO THE DETRIMENT OF MINORITY YOUNGSTERS WHO HAD TO OVERCOME INCREDIBLE OBSTACLES JUST TO GET TO THE POINT WHERE THEY COULD TAKE AN ENTRANCE EXAM.

THE RATIONALE FOR AFFIRMATIVE ACTION WAS BEST STATED BY THE LATE PRESIDENT LYNDON JOHNSON, WHEN HE SAID:

"TO BE BLACK IN A WHITE SOCIETY IS NOT TO STAND ON LEVEL AND EQUAL GROUND. WHILE THE RACES MAY STAND SIDE BY SIDE, WHITES STAND ON HISTORY'S MOUNTAIN AND BLACKS STAND IN HISTORY'S HOLLOW. UNTIL WE OVERCOME UNEQUAL HISTORY, WE CANNOT OVERCOME UNEQUAL OPPORTUNITY."

AND JOHNSON CONCLUDED BY SAYING "IT'S TIME WE GET DOWN TO THE BUSINESS OF TRYING TO STAND BLACK AND WHITE ON LEVEL GROUND. IN SPECIFIC AREAS WE MUST SET NEW GOALS, NEW OBJECTIVES AND NEW STANDARDS."

AFFIRMATIVE ACTION IS THE NAME WE GIVE TO THE ATTEMPT TO HELP BLACK PEOPLE OUT OF "HISTORY'S HOLLOW." IT'S FUTURE -- AND THE FUTURE OF BLACK HOPES -- RESTS UPON THE DETERMINATION OF AMERICA'S EDUCATIONAL ESTABLISHMENT TO PRESS FORWARD WITH EFFECTIVE AFFIRMATIVE ACTION PLANS.

HAROLD HOWE HAS POINTED OUT: "THE BAKKE DECISION OF THE SUPREME COURT DOESN'T REQUIRE AFFIRMATIVE ACTION IN ADMISSIONS PROGRAMS — IT MERELY ALLOWS IT."

AND HE GOES ON TO CORRECTLY IDENTIFY THE CRUX OF THE PROBLEM WE FACE TODAY: "THE COURT'S SUPPORT FOR THE USE OF RACE AS A PERMISSIBLE CRITERIA IN UNIVERSITY ADMISSIONS IS NO GUARANTEE TO MINORITY PERSONS THAT THEY WILL RECEIVE SPECIAL CONSIDERATION IN COMPETITION WITH WHITES."

SINCE THE BAKKE DECISION WAS HANDED DOWN ON WHAT SOME CALL "WHITE WEDNESDAY," WE HAVE BEEN GETTING CONFLICTING SIGNALS FROM EDUCATIONAL LEADERS. SOME SAY THE DECISION WILL RESULT IN NO CHANGE IN THEIR AFFIRMATIVE ACTION PROGRAMS, OTHERS SAY THEY'LL HAVE TO TAKE A CLOSER LOOK AT THEIR PROGRAMS IN THE LIGHT OF JUSTICE POWELL'S PECULIAR SENSITIVITIES.

IN EFFECT, THEY'VE BEEN SAYING "TRUST US." BUT I SEE NOTHING IN THE TRACK RECORD OF THE EDUCATIONAL ESTABLISHMENT, NOR IN THEIR TARDY AND RELATIVELY COMPLACENT ATTITUDE TOWARD MINORITY INCLUSION, TO ENCOURAGE SUCH TRUST.

EVEN BEFORE THE BAKKE DECISION, THE PACE OF AFFIRMATIVE ACTION WAS SLOWING. THE 1977-78 ENTERING CLASS OF MEDICAL SCHOOLS, FOR EXAMPLE, HAD FEWER BLACKS THAN DID THE 1974-75 CLASS, ALTHOUGH THERE WERE SOME ADDITIONAL 1,400 OPENINGS.

SO TRUST MUST BE EARNED. AND TRUST, IN THE POST-BAKKE ERA, MEANS THAT THE EDUCATIONAL ESTABLISHMENT MUST INTERPRET THAT DECISION AS A GREEN LIGHT TO GO AHEAD WITH VIGOROUS AFFIRMATIVE ACTION PLANS.

RESPONSIBILITY IS NOT DISCHARGED BY TAKING THE ROUTE OF LEAST RESISTANCE, BY TREADING A PATH OF CAUTION THAT ULTIMATELY NEGATES THE STATED OBJECTIVES OF PROVIDING EXPANDED OPPORTUNITIES FOR MINORITIES.

THE CHILLING EFFECT THAT THREATENS TO BE THE FINAL RESULT OF BAKKE LIES IN THE FEAR OF LAWSUITS, IN THE EXCESSIVE CAUTION OF LEGAL COUNSELORS AND ADMINISTRATORS, AND IN THE TEMPTATION TO ACCEPT MINIMUM, RATHER THAN MAXIMUM, NUMBERS OF MINORITIES.

JOHN F. KENNEDY SAID "RESPONSIBILITY IS NOT DISCHARGED BY THE ANNOUNCEMENT OF VIRTUOUS ENDS." IT'S NOT ENOUGH TO ADOPT NEUTRAL ADMISSIONS POLICIES AND TO DO THE MINIMUM ALLOWABLE UNDER THE NARROWEST POSSIBLE INTERPRETATION OF THE BAKKE DECISION.

IT IS NOT ENOUGH TO MISTAKE RINGING DECLARATIONS FOR ACTION. WORDS, HOWEVER HIGH-SOUNDING, CAN'T SUBSTITUTE FOR AFFIRMATIVE ACTION PROGRAMS THAT PROVIDE LONG OVERDUE OPPORTUNITIES TO BLACKS AND OTHER MINORITIES.

THE REAL QUESTION FACING EDUCATIONAL ADMINISTRATORS IN THE POST-BAKKE ERA IS WHETHER THEY WILL CHOOSE HYPOCRISY OR EFFECTIVE ACTION. THE BAKKE CASE CLARIFIED SOME ISSUES AND MUDDIED OTHERS. IT CAN BE A MINOR INCIDENT IN THE HISTORY OF BLACK PROGRESS OR IT CAN BECOME A MAJOR SETBACK.

BLACK PEOPLE ARE THUS CHALLENGED TO ESCALATE THEIR PRESSURE ON EDUCATIONAL INSTITUTIONS. THE MAJOR TASK FOR THE BLACK COMMUNITY IN THE COMING MONTHS LIES IN MONITORING AFFIRMATIVE ACTION PROGRAMS AND TAKING IMMEDIATE ACTION WHEN THERE ARE SIGNS OF SAIL-TRIMMING.

AND AMERICA'S COLLEGES AND UNIVERSITIES ARE CHALLENGED TOO. THEY ARE CHALLENGED TO OVERCOME THE PERVASIVE DISCRIMINATION OF THE PAST AND THE DISCRIMINATORY EFFECTS OF SO-CALLED NEUTRAL ADMISSIONS MECHANISMS OF THE PRESENT. THEY ARE CHALLENGED TO DEVISE CONSTITUTIONALLY ACCEPTABLE AFFIRMATIVE ACTION PROGRAMS THAT MEET NOT ONLY THE LIMITS OF JUSTICE POWELL'S OPINION, BUT THE SPIRIT OF A DECISION THAT AFFIRMS RACE-CONSCIOUSNESS AS A LEGITIMATE AND CONSTITUTIONAL FACTOR IN AN ADMISSIONS PROGRAM.

AT STAKE IS THE FUTURE OF BLACK EDUCATIONAL OPPORTUNITY.

AT STAKE IS THE MORAL INTEGRITY OF AMERICA'S INSTITUTIONS OF HIGHER EDUCATION.

BAKKE AND BEYOND

THE REMAND OF BAKKE

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Commission on Law and
Social Action
American Jewish Congress

September 19, 1978
New York City, New York

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The Remand of Bakke

by Nathan Z. Dershowitz
Director, Commission on
Law and Social Action of
American Jewish Congress

In commenting on the Supreme Court's decision in Bakke, there are a number of pitfalls which must be avoided. The first is reading the decision too much in terms of the position advocated prior to the decision. Thus, immediately upon the Court's rendering of its decision commentators announced that "Blacks lost" or that almost all existing university admissions systems have been approved. Neither of these conclusions appear correct. Both conclusions suggest a dispositive decision by the Court resolving all the basic issues.

Actually the result was more a remand to the nation and especially to the universities to try to devise and work toward affirmative action programs within certain parameters. It almost appears as if Justice Powell was advising that basic principles underlying the conflicting arguments on 14th Amendment grounds should be set aside so the real business at hand of increasing minority participation and strengthening our democratic system can proceed. Thus, to the extent university administrators view the 154 pages of legal argumentation made in the six different opinions as directing "business as usual" they are being deficient in their responsibilities.

The University of California at Davis' approach was too simplistic to deal with complex and pervasive problems. Thus, what was presented to the Supreme Court was a poor record upon which to proceed, and too much

reliance was placed upon the case and the Court as the vehicle for answering all the pending difficult problems. Although the Court has given some guidance it has imposed the burden on the universities to devise better and more effective programs.

Justice Powell gave the schools a great degree of latitude but does give guidance for the necessary self-analysis which now must take place. First, all two track systems and all overt and covert quotas must be eliminated, except where imposed by court order to correct past discrimination. Second, pre-Bakke race-conscious programs, especially non-diversity predicated programs, (e.g. those which directly sought to counter the effects of societal discrimination), must be evaluated. Certainly many universities had not modeled their admissions program on the Harvard College model as it is described in the appendix to the opinion. The applicability of such a model to them is a question each school must determine. Undoubtedly there are many universities in this country that wish they had the applicant pool available to them that Harvard College has available to it. Harvard (at least the idealized Harvard referred to in the appendix to the opinion) may be able to secure a heterogeneous student body by adding a plus for race comparable to a plus it adds for geography, or athletic skills, but this may not be possible for many or most schools in this country.

One irony of the opinion is that the diverse types as sought by Harvard College in the idealized version of Justice Powell's opinion (geography, city, farm, violinists, painters, football players, biologists,

historians, etc.) is rarely if ever sought by the professional schools, and I question whether it is educationally justified. What kind of diversity beyond racial and ethnicity is legitimate for a medical or law school is open for discussion. For example, is a sexually balanced class, age balanced class, politically balanced class, educationally desirable? Of greater concern is the fact that, if diversity as a goal is sought because it broadens the educational exposure of students, certain suspect conclusions may follow. For example, can a school on the basis of diversity give a plus for political views, party affiliation and religion?

Problems of this type flow in part from the fact that the effort by Justice Powell to temper the fundamental 14th Amendment conflict, by injecting 1st Amendment concepts of academic freedom, appears dictated more by the desire for a political compromise than constitutional mandates. Bakke had argued that the 14th Amendment in its protection of "persons" is colorblind. The pro-university proponents argued that equality of outcome, history of past color consciousness and the purpose of the 14th Amendment required color conscious remedial action. Only because academic freedom here is supportive of affirmative action does the principle seem viable. But what if the university sought heterogeneity and gave a plus for majority status and a minus for racial minority status? Would academic freedom be seriously considered in the argument? However, too much diversity in the form of restrictions on out of state residence has occurred. Similarly, limitations on Jews or on Blacks in order not to destroy the "homogeneous nature of the school" are matters which occurred in the not too distant past.

It therefore appears that the Powell opinion conceptually raises questions despite its statesmanlike quality in terms of a political compromise. Thus, the second pitfall to be avoided is viewing this "majority of one" opinion as a landmark. It certainly is a milestone. But the opinion itself will be clarified, evaluated and reevaluated on the road toward increasing minority participation in this country.

To those universities which choose to await the next test case upon the assumption that the Powell opinion is not stable and the so-called Brennan opinion will in time prevail, I suggest they try to distinguish their attitude from the attitude of certain Southern schools 20 years ago.

But even if a university concludes that its program can pass constitutional muster, and even if it concludes that it can and is following the Harvard model, the self-analysis should go further. Justice Powell did not require universities to seek diversity. Rather, he approved of the goal of diversity under the rubric of academic freedom. A great degree of flexibility exists for universities under the academic freedom rubric. The ball has been passed back to the universities. If they are serious in their commitment to affirmative action they need not be restricted to the concept of diversity.

For example, a medical school may decide to provide extensive services to the local community. If it skewed its admission system to those willing to service the local community such an admission system may appear justifiable under Powell's opinion. Or if a medical school

wishes to only provide course work in clinic programs, it may deem science scores above a certain point irrelevant. This may result in more minorities admitted. I am certainly not in a position to suggest educationally relevant criteria for admissions to medical schools. My point is that the inquiry need not begin or end with diversity under Powell's opinion.

We must remember the basic fears expressed by advocates of both sides before the Bakke decision came down. I recall a pre-Bakke conference where the moderator forced the advocates on each side to predict the outcome. They were unanimous in one regard, they each thought the Court would undercut their position and predicted victory for the other side. Thus the so-called anti-Bakke advocates feared the undermining of all affirmative action programs and the so-called pro-Bakke advocates feared the imposition of racial quotas leading toward an undermining of individualized evaluations.

Despite the suspect stability of Powell's opinion in terms of its being a landmark, no one can really say their worst fears came to pass. After the consciousness of this country was raised on very basic issues, the responsibility has been remanded, at least in terms of university admissions, to admissions personnel where good faith will be a major factor in shaping the real impact of Bakke. We therefore find ourselves today in a position where the outside principle and principled desires and fears on both sides did not come to pass.

The parameters have been set by the Court, a model has been identified, but that only starts the process; it does not end it. The work must now be done to make legitimate affirmative action efforts with individualized

determinations are without divisive quotas and two track systems a reality in all areas. Affirmative action has been endorsed without voluntary racial quotas and two track systems. Within these parameters those on both sides of the Bakke case now have guidelines within which to work constructively together. The Court remanded the case to all of us for this basic work.

BAKKE AND BEYOND

TESTING/ADMISSIONS: WHAT CAN AND CANNOT BE DONE

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Testing/Admissions: What Can and Cannot be Done

The Bakke Case may be or may become the only case in the history of the Supreme Court in which the pre-decision reverberations far exceed the post-decision reverberations, for few, if any, issues to be considered by the Court have been so freighted with emotion. There are, nevertheless, two matters that will continue for some time to demand attention on the part of those who recommend or make policies in higher education, as well as those who administer them: (1) Tests and (2) admissions policies and procedures.

Thus in the course of these remarks, I shall attempt to do three things:

1. To suggest what tests, as instruments with serious limitations, can and cannot do;
2. To suggest some major distinctions between the role of public and educational policy on the one hand and tests on the other;
3. To suggest some testing/admissions guidelines for selective graduate and profesional schools for this post-Bakke era.

What Tests Can and Cannot Do

Very many years ago when I, as a young graduate student, was enrolled in my first educational measurement course, I became hooked on what appeared to me, at the time, to be a profound and enduring principle of measurement. It was written by W. A. McCall and it said: "Everything that exists, exists in some amount and anything that exists in some amount, can be measured." Now, nearly 40 years later, and very much unhooked, I consider the statement to be one of the most visionary ever written by a responsible scholar. It's not that it may not be ultimately true, but it may take several more generations, even in fast moving times such as these, to become a working principle in the

educational establishment. My allusion to this ancient assertion is relevant, I think, because too many Americans in places of power believe that tests can do just about anything--that they possess a divining mystique that can do for aptitude, ability, and subsequent performance what a set of scales can do for weight or what a tape measure can do for length. And this is patently not the case.

Research and development in testing over the past 35 or 40 years have improved tests to the point where they can do a number of very useful things:

1. They can diagnose academic deficiences and weaknesses but far too few excellent instruments have been developed for this purpose;[1]
2. They can determine the level of mastery, i.e., how much a student knows in a number of subjects or fields;
3. They can identify, with reasonable accuracy, the very able and the very weak students who apply for admission to selective institutions;
4. They can indicate, in general terms, the level at which a student or a group of students is performing with respect to some relevant criterion or criteria;
5. They can determine, within generally recognized margins of error, the readiness of individuals or groups to perform certain skills or enter certain professions--provided the skills involved or the functions required by the profession can be clearly identified and described;

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1. T. Anne Cleary, et al: "Educational Uses of Tests with Disadvantaged Students", American Psychologist, January 1975. pp. 15-45.

6. They can predict, by sampling behavior, how individuals will perform in the future with respect to relevant criteria, within reasonably definable limits of error.[1]

This list is, of course not intended to be exhaustive.

In indicating what tests can do, it is assumed for the purposes of this discussion, that the instruments are soundly constructed, properly administered, competently interpreted and fairly used.

But no matter how soundly they are constructed or how efficiently they are administered, or how competently they are interpreted, or how fairly they are used, there are at least four things that tests cannot do:

1. They cannot measure innate ability—only current performance;[2]
2. They cannot measure without substantial error—thereby classifying some students as potential successes who will fail and some as potential failures who will succeed;
3. They cannot measure drive, motivation or persistence—attributes that frequently compensate, to significant degrees, for modest ability;
4. They cannot predict, with any substantial accuracy, who will or will not succeed in a given profession—success in a profession being a function of many variables; not simply academic ability.

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1. For an illustration of how large errors can be made even on good instruments, See: Leo Goldman. "Test Information in Counselling: A Critical View" in "Measurement for Self Understanding and Personal Development". Proceedings of the 1973 Invitational Conference on Testing Problems. Educational Testing Service.

2. Cleary, et al., Op. Cit.

These limitations alone suggest that serious considerations be given to factors other than test performance where admission to selective institutions is concerned. Even more importantly, it should be remembered that institutions of higher learning are established to serve certain public purposes and this brings us to the matter of policy.

Tests and Policy

It should be made clear at the outset that admission to a professional school or to any highly selective institution of higher learning is not the choice between qualified and unqualified applicants; the choice is from among qualified applicants—all of whom are able to pursue the work required. To suggest otherwise is to confuse the issue with a red herring. Qualified applicants will, however, bring different attributes and different degrees of qualification to the study for a profession.

As the Carnegie Council on Policy Studies in Higher Education points out, the public has a clear interest in the problem of access to higher education and especially to graduate and professional education. This interest, according to the Council, is rooted in the following:[1]

1. The need to have individuals trained in areas vital to the well-being of the entire society;
2. The role professional schools can play in determining composition of professions and thus the services available to society;

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1. Carnegie Council on Policy Studies in Higher Education, "The Relevance of Race in Admissions: A Summary of the Position of the Carnegie Council on Policy Studies in Higher Education as Reported in "Selective Admissions in Higher Education: Public Policy and Academic Policy," 1978.

3. The need to meet the "diversified needs of a heterogeneous, pluralistic nation";
4. The need for individuals of potential talent from all segments of society to have a fair chance to rise to positions of leadership, both in simple justice to them and for their service as leaders and models for those in each segment of the society.

This public interest cannot be served by merely selecting for admission those applicants with the highest combinations of test scores and grades--important as they are. Moreover, as the Carnegie Council further points out, tests and grades are not sufficient as a sole basis for decision. "They are best" it says, "at identifying at one end of the spectrum those applicants who are likely to distinguish themselves academically and at the other end those likely to fail--and failure is costly to the student and to the institutions. They are insufficient for determining the admission of a great many persons found between these extremes." 1 (Emphasis supplied) In other words, there is a need for an admissions policy which serves both the public and the academic interests.

Tests are only instruments which are useful in helping to set and implement policy--policy defined as a definite principle or method of action selected from among alternatives and in the light of given conditions to guide and determine present and future decisions with respect to admission to highly selective graduate and professional schools. But in the setting of a policy that serves both the public and academic interests, there is no substitute for human judgment.

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1. Carnegie Council on Policy Studies in Higher Education, Op. Cit., p. 5

In brief, the purpose or role of public policy where admission to professional schools is concerned is to serve the public interest. The purpose or role of academic policy is to insure the educational integrity of the educational programs and the institutions involved for the larger good. Public and academic policies should, of course, be mutually complementing.

Suggested Testing Admissions Guidelines

Paul Fruend, the distinguished professor emeritus of law of the Harvard Law School, has written some penetrating comments about the Bakke decision: "Hard cases often make fuzzy law. We do know that Mr. Bakke is entitled to enroll in his medical course, but beyond that the court has given us little definitive guidance in the field of racial preference." He commented further that the real significance of the case is that "we are dealing with a complex problem whose outer contours can be drawn by judges but whose resolution lies within a wide spectrum of moral and practical choices to be made by ourselves, choices that consider not only individual rights but the health of the society in which those rights are asserted."[1] Professor Fruend, I think, is correct. The resolution of the problem we now inherit in the post-Bakke era does rest largely with the universities which can indeed make their decisions from a wide range of choices--moral and practical.

Where the real "cannot's" are concerned, there was only one of any importance and that was decided by the narrowest of margins--5 to 4. In effect, the majority (Powell, Berger, Stevens, Rehnquist and Stewart) held that the racial "quota" system employed by the University of California at

1. Paul Fruend, "Bakke: The Choices that Remain", The New York Times, July 9, 1978, p. E-17.

Davis was unacceptable as a basis for deciding who should be admitted. Thus any institution that bases its policy on this principle should, I think, be advised that such a policy belongs in the "Cannot" column.*

Where the "Can" column is concerned, there were two major positions:

1. Race or ethnic designation may be included as one consideration in the admissions process—the Harvard College admissions program being cited with approbation;
2. Affirmative action, at least by implication, is acceptable.

Given these two "positive" aspects of the decision, the following, by extension, it seems to me, belong in the column of what is permissible:

1. Programs with a common set of admissions criteria and a single admissions procedure (not a two-tract procedure) that takes into consideration race or ethnic designation, disadvantage geographical location, or other relevant factors that serve the public or academic interests of the institutions involved, e.g., Michigan State University's School of Human Medicine which has a 23 percent minority enrollment.
2. Programs with admissions criteria which are matched with human service needs. Examples include the University of California's Medical School at San Francisco which has a sub-committee of the admissions committee concerned with identifying prospective medical researchers and McMaster University's Medical School (Canada) which seeks applicants with community work experience and small-group, problem-solving skills to become competent primary care physicians.

* If previous discrimination has been demonstrated, "quotas" could conceivably, be legal.

3. Programs that carefully assess socio-economic disadvangage, e.g., the University of Texas Medical School at San Antonio where 22 percent of the 1978 entering class is disadvantaged and of this group, 60 percent are Spanish surnamed, 15 percent Black and 25 percent White.
4. Programs that do not heavily emphasize test scores, e.g., Michigan State University which converts the range of test scores into a six-point scale.[1]

In addition to all of the above, an effective Affirmative Action Program should also bring substantial numbers of minorities to the faculties, the administrative staffs and the governing boards. These minority members can serve as internal monitors where effective minority admissions programs are concerned and generally raise the minority-sensitive levels of professional schools.

While the Court frowned upon quotas, it should be born in mind that admissions programs that produce very few or no minority admissions should be subjected to critical examination. In such a situation, the Harvard program could be useful. For the academic year 1977-78, this program achieved an enrollment which included 8.1 percent Blacks, 46 percent Hispanics, 5.7 percent Asians, 8 American Indians, or a total minority enrollment of 18.8 percent. Those institutions concerned about the legality of either existing or proposed admissions programs, should also examine the Harvard admissions programs with special care, since Justice Powell specifically cited this program approvingly. The essential principles that characterize this

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1. These four points are adapted from Bruce Fuller, "Alternatives After Bakke: Issues for Campus and Government Policy Makers." California Post Secondary Commission, 1978. See also: Winton H. Manning, "Beyond Bakke": The Unfinished Business in Admissions", Current Issues in Higher Education. Washington, D. C.: American Association for Higher Education, 1978.

program are, in my opinion, four in number:

1. It is built on a very strong commitment to a diverse student body for the educative value of diversity;
2. It utilizes race as one criterion for selection;
3. It recruits widely and vigorously to increase the diversity and size of the eligible pool of students;
4. It sets no specific quotas in the effort to achieve diversity.

Not every institution can or should copy Harvard. The essential principles, however, can go a long way toward determining what can be done.

The bottom line of these remarks is that in the Bakke decision, the Court left great lattitude for institutions sincerely desiring to redress racial, ethnic and other critical imbalances in highly selective professional and graduate schools. And considered in this light, Bakke is not a disaster--except as institutions, with faint hearts and feeble moral commitments to equality of opportunity proceed to make it so.

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BAKKE AND BEYOND

AFTER BAKKE: THE ROLE OF THE STATES

James M. Rosser
Vice Chancellor
New Jersey Board of Higher Education

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12-13-78
Jim Rosser

AFTER BAKKE: THE ROLE OF THE STATES

The decision handed down by the United States Supreme Court in the case of Allan Bakke has virtually ended the seemingly endless period of legal inquiry into the question of whether race could be considered a factor in the admissions policies of institutions of higher education.

The decision itself is regarded by some as a genuine invitation to institutions of higher learning to devise "good faith" experiments that will ensure the inclusion of minorities. They view it as a good and hopeful sign, based perhaps on their own personal predilections of what is right, their own experiences with the positive attempts made by certain institutions, and on their understanding of what the Court could have done but did not do.

To others the decision is, at best, the mere granting of permission to institutions to do whatever they like. Their attitude, I suspect, is founded in their very real understanding of what occurs when nothing is required. Perhaps they have every right to be skeptical; for many promises have been made and, although many have been kept, opportunities for most minorities still are very limited.

This is not to say that no gains have been made. Indeed, we have made great forward strides in opening

the gates of opportunity. In 1940 only 7.4% of the black population, for example, completed high school; today 75.3% graduate. The numbers of black persons who take part in postsecondary education also has increased enormously; from less than 50,000 in 1940 to over 1,062,000 in 1976. But interestingly, only 2% of all practicing doctors and just over 1% of all practicing lawyers are black, and blacks continue to be seriously underrepresented in our graduate and professional schools.

A recent study conducted by the Educational Testing Service for the Law School Admissions Council[1] concluded that if admissions committees were forced to disregard racial factors in making admissions decisions, the numbers of minorities in law schools would be greatly reduced and that most of them would attend the least effective institutions.

The study divided the law schools into three categories of selectivity based on applicants' mean LSAT scores and academic records. It found that in the most selective law schools (the top 10%), 10 blacks and 11 Chicanos would have been accepted; in the moderately selective schools, 185 blacks and 118 Chicanos; and in the least

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[1]"Supreme Court Case Sparks Admissions Bias Controversy," ETS Development, Volume XXIV, Number 3, ed. Mary Churchill, (Educational Testing Service, Princeton, New Jersey, 1977), pp. 1-2.

selective, 515 blacks and 171 Chicanos. Medical schools and other graduate professional institutions have drawn similar conclusions.

A partial answer to why blacks and other minorities remain underrepresented in our graduate and professional schools in spite of a nearly five-fold increase since the early 60s may lie in the reality that, unfortunately for the majority of the disadvantaged, access has meant little more than the generalized ability to enroll somewhere. We all know that institutions of higher education are not equal or equivalent in resources or quality of offerings and we all know that a student's future may depend as much on where he attends as whether he attends. The painful fact is that most low-income and minority students attend two-year and non-selective four-year colleges.

The Bakke decision relates to graduate school admissions. But it would seem that the underrepresentation of minorities in graduate and professional schools has as much, if not more, to do with early educational experiences. A study conducted by James Henson and Alexander Astin has lead to the conclusion that significant numbers of minority freshmen and graduate students are lost by low participation rates in high school and at college

entry. "An increase of 56.8 percent in black freshman enrollment would be realized if blacks attended high school and college in the same proportions as whites. This increase could eventually increase the number of blacks earning B.A. degrees each year by 77,398 students (75.7 percent).

If relaxed graduate admissions standards could increase by 20 percent the proportions of blacks entering graduate school from college, the absolute increase would involve only 7,110 blacks, compared with 20,926 who would be added if black high school and college participation were comparable to that of whites.

In short, increasing the participation of blacks at lower educational levels appears to offer substantially greater potential for eventually increasing the representation of blacks in graduate and professional schools than do changes in graduate and professional school admissions standards."[2]

Of course, the Henson-Astin study relates only to participation itself and does not address, and not improperly so, the nature of the experience itself. It is widely known that the quality and value of the

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[2] James W. Henson and Alexander W. Astin, "The Minority Pipeline: Minorities at Different Educational Transition Points," Admitting and Assisting Students After Bakke, eds. Alexander W. Astin, Bruce Fuller, Kenneth C. Green, (San Francisco, Jossey-Bass Inc., 1978) pp. 41-57.

educational experience at all levels, including elementary, and secondary has declined over the years. The results of the recently conducted Basic Skills Assessment Program in New Jersey, for example, are not encouraging. They show severe deficiencies in the basic skills of first time freshmen admitted to the public institutions in that State. They also show that the problem is widespread and cuts across all socioeconomic levels but, as you would expect, students from urban high schools are the least well prepared.

Quality of teaching and that of any given school are but two elements in the education of any individual. Each of us knows that learning is related to other very important influences such as health, nutrition, family influences, and general living conditions. And when we examine the situation of blacks in this country--whom I use as examples because the information about them is more reliable than that about other minority groups--the prospect is discouraging, indeed.

"In terms of jobs:

- the average earnings of black families have receded to 59% that of whites;
- the movement of blacks from lower paying into higher paying jobs has slowed considerably during the '70s;
- blacks who account for only 11% of the population in 1974, constituted 1/3 of all Americans living below the poverty level. In other words, four

out of 10 black children were being raised in poverty that year, while only one out of 10 white children could be classified as poor. And I suspect it has not changed since then;

- opportunities for blacks are limited by occupational segregation, de facto job ceilings, lack of seniority, and various structural problems;
- the unemployment rate of black youth was 39% in November, 1977 and government and industry does not seem ready to respond.

In terms of housing:

- 3/5 of all blacks live in the decaying, inadequate centers of cities;
- the practice of "redlining" continues to cause the further deterioration of black neighborhoods;
- 80% of all American families live in segregated neighborhoods."

Not a very sanguine assessment, but one that supports my perceptions which are, in turn, reinforced nearly every day as I read the newspaper. Indeed, I think we must accept that we have very far to go, and that we will find the way hard and fraught with many obstacles. For the Bakke decision, as important as it is, is but one

part of the solution to a problem whose facets are myriad. Nevertheless, the Court's rejection of the doctrine of complete racial neutrality has shifted the issue back from the legal arena to the policy arena and thus makes it possible, indeed incumbent upon us, to concentrate on the central social issues and the social and economic problems that attend them still before us in the latter part of this decade: the under-representation of minorities, not just in higher education, but in responsible positions in American society as well.

While education may well be a primary state responsibility, that responsibility goes considerably beyond education as such and lies in assuring its citizens access to critical human services such as health, legal assistance, and adequate housing. It is the public's need for these services that has provided the primary rationale and impetus for the expansion and public support of graduate and professional programs.

Even so, progress in improving access of the traditionally under-served communities to human services has been even slower than progress in equalizing access to graduate and professional programs. And yet the problems of mal-distribution of human services continues unchecked in rural and inner-city areas. Pat Callan, from California, has pointed out that "our most fundamental and urgent problem is equity in the distribution of human services, not

equalizing the professional pathways to affluence, or even, as the Bakke decision implies, diversification of our student bodies" as desirable as these may also be. Clearly then, among our most critical public and institutional mandate is the creation of a policy framework that emphasizes societal needs, and supports the education of those individuals most likely to contribute to meeting them.

Toward that end, among our central state and national objectives should be full and equitable representation of minorities in professional and graduate programs and in the professions themselves. If this goal of American society is to be reached it must be addressed by institutions, the states, and the federal government working collaboratively. It cannot be achieved by one sector alone. To be sure, the focus of many educational decisions -- including admissions decisions -- is and should be at the institutional level, but the context in which such decisions are made includes the states and the nation.

Constitutionally and historically, the primary legal and financial responsibility for meeting the educational needs of citizens rests with the states, the state in this sense to include executive and legislative branches of state government and state higher or postsecondary education agencies.

It is critical now to develop an effective post-Bakke agenda designed to overcome underrepresentation directed toward three goals.

The first is recapturing the initiative for renewed commitment for new efforts within the guideposts established by the court--overcoming the psychological effects of the Bakke case which for a time cast a shadow or placed under question all affirmative action programs.

The second is developing strategies that take into account the complexities of the educational, political and fiscal environment of the 80s--complexities which could unintentionally undermine rather than strengthen initiatives towards overcoming underrepresentation.

(See card)

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Tax limitations -- Proposition 13

Limited fiscal resources, accountability and reallocation of resources.

Enrollment changes and decline and competition for students.

Basic Skills

The third is the establishment by the State of a framework and conditions conducive to the development and maintenance of effective programs at the institutions.

In pursuit of these goals certain specific activities can be undertaken:

For state higher or postsecondary education agencies:

a. Disseminate accurate information about the Bakke decision to policy makers.

b. Identify and disseminate admissions models which have succeeded or give promise of succeeding in increasing enrollment of underrepresented minorities at graduate and professional levels within the Bakke guidelines.

c. Encourage or require institutions to develop their own plans for overcoming underrepresentation.

d. Conduct human resources studies that identify specific community as well as aggregate state needs in critical human service areas.

e. Explore institutional and other factors that help determine student's decisions in relation to location or practice or professional involvement.

f. Monitor more effectively progress in increasing minority representation in graduate and professional schools.

g. Provide more adequate evaluation of programs designed to increase the number of eligible minority students by increasing their representation at the under-graduate level and in appropriate programs--student aid, basic skills, outreach, information, counseling, etc.

h. Use the goal of overcoming underrepresentation as a critical factor in program and budget review to assure that decisions particularly in relation to retrenchment are sensitive to the critical importance of adequate support for effective programs.

i. Sponsor and provide fiscal incentives for special programs which reach into the elementary/secondary schools as a means of addressing early basic skills, science, and math needs.

j. If necessary, realign priorities to insure that overcoming underrepresentation remains or becomes a central and explicit goal in statewide planning and its implementation.

k. Improve articulation with and encourage better support of the traditionally black colleges.

For legislative and executive branches of state government:

a. Through formal resolution and/or executive order reaffirmation of the state's commitment to affirmative action and overcoming underrepresentation both in educational opportunity and in providing general state services.

b. Request through the state higher education agency or directly from institutions progress reports from each institution on attainment of affirmative action goals. These reports should include:

(1) Analysis of student composition with special emphasis on graduate and professional programs. This analysis should also include retention

rates, program distribution of graduating high school students in the state.

(2) Evidence that admissions policies take into account human services needs of underserved communities and that efforts are being made to seek out qualified students most likely to address these needs.

(3) Evidence that particular admissions criteria are sensitive to unmet human services needs.

c. Assign, in the budgetary review, recommendation and appropriations process, high-priority to programs addressing the issues of underrepresentation and affirmative action.

d. Encourage college and university involvement in early outreach programs to prepare minority students for college work.

(Possibility of establishing sanctions for non-compliance.)

e. Require that overall state planning for elementary/secondary and postsecondary education address the issue of underrepresentation and include strategies for overcoming it.

Educators and public officials in this country are on the brink of many important choices. I trust that they will choose wisely and will use the Bakke decision as a means of

reviving affirmative action initiatives and as a means of making further progress toward overcoming the problem of underrepresentation.

To quote from Justice Powell, "only under such circumstances will the states' legitimate and substantial interest in ameliorating or eliminating the disabling effects of identified discrimination" be realized.

BAKKE AND BEYOND

THE BAKKE DECISION AND GRADUATE SCHOOL ADMISSIONS: WHAT IS EQUITABLE?

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October 19, 1978

New Orleans, Louisiana

The conference is cosponsored by the Inservice Education Program of the Education Commission of the States and The Justice Program of the Aspen Institute.

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THE BAKKE DECISION AND GRADUATE SCHOOL ADMISSIONS:
WHAT IS EQUITABLE?

(Presentation at the Bakke Seminar, coordinated by SREB, in New Orleans, October 19, 1978)

The implications of the Bakke decision for admissions procedures are clouded, at best, but they may appear clearer for graduate schools in general than they are for professional schools such as law and medical schools. Admissions to graduate schools are seldom restricted by a pre-selected number of places. Most graduate programs with which I am familiar will admit all qualified applicants--and then wish for more. Financial aid to enrollees may be limited, and that limitation may crucially affect the applicant's response to admission, but admission itself only infrequently depends on competition for a number of places. Therefore the direct impact of Bakke on graduate school admission policies and procedures, except for those infrequent programs with limited places, appears to be meager.

The appearance of meager direct impact may dull our appreciation of significant, indirect impact, however. In spite of the differences among the Justices on details and on the pathway to the position of a majority in this case, I believe that the expectation, the requirement of equitable treatment permeates all of the opinions. The dilemma lies in the question, how can we include race and give equitable treatment in our admissions decision-making. So far as graduate school admissions (and probably professional school admissions) are concerned, my thesis is that equitable treatment may result from equal protection but not necessarily from equal treatment.

Equitable means fair, impartial, just. Those meanings for equal are now archaic and misused; equal means of the same number, uniform in operation.

There is a distinction, and a uniform operation in use of test scores, for example, may not in fact be fair, impartial, and just.

I shall attempt to illuminate this issue by describing some aspects of the Graduate Record Examination scores, which are used widely by graduate schools in admissions procedures, including recent analyses by my Associate Dean Carolyn Hargrave of the significance of those scores for the black graduate students enrolled at LSU. I strongly suspect that similar significance and conclusions would emerge from analyses of test scores used by professional schools, but I do not know of such analyses. Your attention will be directed to the use and misuse of test scores in admissions procedures and the need for, not just the permissibility of, race-consciousness in such use.

The GRE is used in admissions procedures, I believe, to provide an across-the-board measure of academic potential among all the applicants, wherever and whatever might be their undergraduate preparation. The GRE score is used as a predictor of academic performance in graduate school; that is, as a measure of qualification for admission. To the extent that the GRE score (or any other measure) plays a significant role in the admissions decision, equitable treatment requires that all applicants with equal academic potential, or with equal measures or estimates of that potential, have equal chances of being admitted.

The Graduate Records Examination Board and staff have cautioned against the use of any set score as a cut-off for a favorable admissions decision. Yet some graduate schools and some departments use a cut-off number. A score of 1000 for the two-part aptitude test is often cited as the cut-off number. What do you get if you use a cut-off of 1000 (or any other score)? You get a wide variation in academic potential. For English or Microbiology, you get students in the upper half of all students taking the GRE and indicating intent to study in those fields; for Physics and Computer Science,

you exclude only about 25% (mean scores, 1200 or over); for Education and Speech, you exclude about 70%. Performance on the same test varies rather widely with the field. Now what is the equitable goal for graduate admissions? To have the same academic potential regardless of field, or to have the equivalent academic potential (say, in the top half of the national pool) for each field? I believe that it is reasonable, defensible, logical, equitable to choose the latter.

GRE scores vary with field--that is documented on a national scale--and a field-conscious aspect to admissions decisions, though seldom used or advocated, seems untroublesome, even desirable. GRE scores for LSU graduate students also vary with race. The mean scores for black students are lower than the mean scores for white students by about 270 points, about the same difference as between the national mean scores of students planning to enter Physics or Classical Languages programs and those planning to enter Library Science or Speech ones. Although the GRE Board has published data on variation of mean scores by field and by sex, it has not published such data by race. In the most recent GRE Technical Manual, there is a qualitative statement about the variation with race (mean scores for blacks are lower than those for whites), but no quantitative data are given. For LSU students, GRE scores are at least as well correlated with grades in graduate school for black students as for others. A recent report from the Ford Foundation about the records of 10 years of Ford Foundation Minority Fellowship recipients agrees with our conclusion, even to the magnitude of the correlation coefficient. GRE scores for both the LSU sample and the Ford Foundation sample are "correlated with graduate school grades and with whether or not one eventually earns the doctorate"; for both samples, undergraduate grades of blacks are not correlated with graduate school performance. The correlations between GRE scores and graduate school performance for

minority students and for other students are about the same, but the scores for the groups are different. That is, if we want to select a group of applicants for admission and want to have them fall within the same range of predicted academic potential, we should use different scores for different races just as we should use different scores for different fields.

Different people with different points of view will generate different speculations about why GRE or other test scores vary with race. Whatever the correct reason, pretension that the difference does not exist is clearly disadvantaging and unfair to some groups. If the available data from the two small samples mirror nationwide data, use of the same numerical cut-off or requirement, which superficially appears equitable, in fact imposes a higher measure of academic potential on the lower scoring group than on the higher scoring one.

The Bakke decision may seem merely to brush graduate schools with only infrequent limitations on numbers, but it should prompt serious reevaluation of admissions procedures to discern whether equal treatment has actually led to equitable treatment of applicants. Among the several documents I studied for this meeting was A Report of the American Council on Education--Association of American Law Schools Committee on Bakke, which included the following passage: " There is an inevitable tension between the concept of fairness, which implies uniformity in application of standards, and discretion, which implies informed judgment not bound by rigid standards. For Justice Powell and perhaps for other members of the Court, the scales tip toward the use of informed judgment..." I agree with the focus of the passage but quarrel with the antonymous positioning of fairness and informed judgment. The passage says: "...the concept of fairness, which implies uniformity in application of standards..." That, I believe, may be the key

to the Bakke decision dilemma: uniformity in application of standards. But our best informed judgment is required for uniformity in application of standards, to tell us what the numbers really mean. Equal does not always imply equitable. And equitable, not equal, means fair.

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BAKKE AND BEYOND

BEYOND BAKKE:

THE POSITIVE BENEFITS OF TESTING

by
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Institute of Higher Education
University of Georgia

Paper prepared for Invitational Regional Seminar: Bakke and Beyond. Sponsored by the Inservice Education Program of the Education Commission of the States and the Justice Program of the Aspen Institute in cooperation with the Southern Regional Education Board in New Orleans, Louisiana on October 19, 1978

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BEYOND BAKKE:
THE POSITIVE BENEFITS OF TESTING

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In Bakke, as in previous cases involving standardized tests, the Supreme Court has shown an obvious degree of deference. There has been explicit deference to Congressional intent and administrative guidelines (Griggs v. Duke Power) and an appreciable reluctance to enter the fray of testing controversies (Albemarle v. Moody; Washington v. Davis). While the extent to which the technical or arcane features of standardized tests can be debated in a court of law is open to serious reservations, Supreme Court rulings provide an important context in which public policy concerning the uses of standardized tests must be debated. Policy is the framework in which testing issues must be resolved, and Bakke, with all its ambiguities, is now part of the landscape.

It should be obvious that the results of testing may be positive as well as negative. With all their imperfections, standardized tests remain a valuable source of information and a useful educational instrument. Much of what we know about racial, ethnic, and sexual differences in educational achievement is the result of standardized testing. Other sources of information -- teacher ratings, interview impressions, direct observation, etc. -- frequently lack the precision, accuracy, and credibility sought in standardized testing. There is

little doubt that testing has been a valuable part of educational efforts to discover and develop talent -- and testing has been the basis of a psychology of individual differences that has sustained public education throughout much of the 20th century.

But abuse of standardized testing has been widespread. In many respects those who construct and develop tests cannot ensure their professional and beneficial use. Technical competency in test research and development has far outpaced professional and socially responsible uses and applications. Users and consumers have not been "mature and wise" always in their administration, analysis, and interpretation of tests. In brief, the typical classroom teacher now receives little, if any, instruction in the uses and applications of tests and measurements. The typical school or college is without an admirable degree of sophistication concerning test technology and educational uses.

The continuing controversies that surround the uses of standardized tests, an era of litigation, and the emerging dictates of public policy imply that traditional test theory and practices are no longer adequate. A host of critics and adversaries of conventional uses, advocates of new rationales and purposes, and a professional literature with bursting seams suggests that: (1) alternative uses and applications of testing must clearly be defined and established, and (2) complementary methods and approaches must be devised.

The continued use of standardized tests in education is assured by the necessities of the foreseeable future, but the re-structured use of such tests would seem clearly mandated. At the same time there is an obvious demand for other approaches and procedures that serve the same educational and social purposes.

Alternative Uses of Tests

The controversies in standardized testing are their uses for educational and employment purposes -- and the social consequences that follow their use. Test construction and development have been dominated by a search for a high degree of reliability or stability for individual scores and an acceptable degree of precision or accuracy in the prediction of future performance. This concern for reliability theory and predictive validity meant that the uses of such tests were inherently selective -- and for racial or ethnic minority groups the exclusionary implications of selection have been their characteristic feature. Because tests were presumably objective, applicants were too frequently, and too easily, told that they had "failed the test."

New Rationales for Testing

Pluralism and diversity in education have convinced many observers that a different philosophy or theory of testing is sorely needed. Traditional concepts and principles may have served well the purposes of education in an earlier era, but

they provide a disservice in schools and colleges that must adjust to a pluralistic clientele. A "sorting and channeling" function that tests have served in the past is now inappropriate because education is a social benefit to be given the broadest possible distribution and is increasingly perceived as lifelong experience rather than a preparatory activity. Changing conceptualizations of education and schooling dictate changing purposes and uses of testing (Tyler, 1977).

Alternative uses are sought then in ways that would shift the emphasis in testing: (1) from measurement to assessment, (2) from people to programs, and (3) from aptitudes and general intelligence to skills and competencies. Each attempt should break testing out of its narrowly conceived role in a predictive, selective sense and broaden or extend its uses for the explicit purpose of facilitating teaching and learning in an educational setting. Selective admissions will remain a necessity in many professional and graduate programs where educational and social costs prohibit an open-door practice or an extended try-out. It will also remain "a fact of life" in courses or programs where the demand greatly exceeds facilities, resources, and instructional capabilities. But traditional selective admission practices are not needed in the same way they were in a period of limited opportunity. For many institutions the prediction of future performance may well be as effective as it ought to be (Fincher, 1974). Testing is now needed for other purposes such as placement, exemption, credit and evaluation.

From Measurement to Assessment

The changing emphasis from measurement to assessment reflects the educational need to appraise those changes in behavior and performance that presumably are the result of learning and development. With increased recognition that students can and do learn a great deal without the benefits of formal instruction and with increasing insistence that "extracurricular learning" be acknowledged and perhaps certified, there is a need for assessment procedures that do not aspire to the precision and accuracy traditionally desired in measurement. Instead of determining "how much" learning has taken place, there is more often a need to determine if learning has taken place. Differences of degree, ordering, and ranking are not needed as much as an acceptable way of ascertaining if learners have mastered, acquired, or accomplished some explicit standard of performance. Assessment is relevant, therefore, not only to basic literary skills such as reading and writing but also to program objectives and standards.

The concern for assessment is also a reflection of the returning desire for absolute or positive standards as cpposed to the relative standards that are implied in traditional concepts of testing. Standardized tests of educational achievement have usually involved a comparison of the individual's performance with "norms" established on some identifiable group. Criterion-referenced tests are an

attempt to specify performance in educational or learning terms and to decide rather directly if individuals have reached or obtained some specified level of performance. The National Assessment of Educational Progress (Johnson, 1975) is the most extensive application of assessment concepts and procedures to date.

From People to Programs

A broad concern for program evaluation suggests that assessment techniques are needed for programs and projects as well as for student achievement. Accountability would seem to be a particularly strong insistence that the worth of programs be demonstrated by methods other than the status of individuals as the conclusion of formal education. Both concerns imply an obvious need to evaluate input, process, and output variables that characterize educational programs. It is the program rather than its participants who are thus evaluated.

Testing concepts and methods are needed then to help appraise instructional methods and materials, program structure and content, and overall program effectiveness in bringing about desired outcomes and results. This need lies close to the heart of the controversy that has accompanied teacher evaluation and statewide assessment in the public schools. Proponents of program assessment believe it should be the program that is evaluated and neither the teachers nor the

students as individuals. Performance review for teachers and learning achievements for students are objectives that must be realized under other conditions and rules-of-the-game. Both may be a part of program assessment but only in ways that clearly protect the professional integrity of the teacher and the learning needs of the student. Program assessment calls for instruments, procedures, and techniques that are different.

From Aptitudes to Skills

Concurrent with the shift from measurement to assessment and from people to programs, the purpose and intent of most educational testing needs to be changed from a concern with potential to a better judgment of actual accomplishments. Aptitude, readiness, and general intelligence tests have been the subject of most litigation involving standardized tests, and without exception, it has been difficult to satisfy the court's requirement of a logical, rational relation to explicit educational objectives. By and large, the courts have shown little infatuation with predictive validity and usually skirt its merits, arriving at their decisions on other grounds. Federal agency guidelines, on the other hand, have pegged the use of tests in employment quite tightly to predictive validity because of the vulnerability personnel tests have in that respect.

Educational policy would seem to have dictated long ago that achievement should be the object of testing, but there

has been a consistent failure to tie testing concepts and practices firmly to instructional objectives. The most widely used test of academic potential, the Scholastic Aptitude Test (SAT), has been both useful and effective despite the fact that it is a general test of verbal and mathematical ability and not specifically based on courses or programs taught in secondary schools. In short, the test presumably measures abilities that are learned or acquired but not taught. Only recently has there been any genuine acknowledgement that it could be taught.

Concepts of test fairness have increasingly implied that learners should be tested for what is taught. The logical, rational uses of tests in education would seem to be served only when the basic assumption of "equal opportunity to learn" can be met. Although generalized abilities may predict future performance or behavior, the courts have clearly preferred concepts of achievement or accomplishment that could be seen as a logical expectation from the training or instruction previously received. The push for competency-based education is a function of the growing belief that tests ought to measure skills, competencies, or abilities that are the direct outcome of learning and development. If testing is concerned with performance or mastery and related to instructional objectives or learning opportunities, there is less likelihood of a successful challenge in a court of law. By the same token, there is more likelihood that the testing serves a useful, educational purpose.

The Constructive Uses of Tests

The new rationales for testing are based on the premise that there remains positive, constructive benefits to be gained from systematic, educationally sound testing in the nation's schools and colleges. No useful purpose would be served by a moratorium on testing as such -- or by continued controversies that are spurious or ill-adaptive to the solution of educational problems or issues (See Houts, 1977 as one example of the needless literature of controversy).

Positive benefits are to be gained from testing if the focal concern can be shifted once and for all from selection per se to placement, advisement, counseling, and program assessment. Despite incessant advice that test scores should be but one source of information in selection decisions, the dominance of predictive validity has assured that the use of standardized tests in selective admissions will continue to be controversial because test data may be more specific and concrete than other forms of information usually are. Any use of test information in selective admissions should be an explicitly weighted component of the decision process, however, and the test's particular contribution or use should be known. The Georgia Power Case is explicit in its ruling that tests must be validated in terms of their actual use in the decisions affecting employees. It is not sufficient for a test to have predictive validity if such is not known at the time decisions and judgments affecting the applicant are made.

The gist of new rationales in testing should be that the value of any testing or assessment procedure should be judged primarily by the extent to which it aids learning or improves instruction. Testing theory and practices should be firmly established within a context of educational policy and practices. Where tests do not serve educational purposes and functions, their continued use in educational institutions should no longer be justified. Specific uses served by testing include:

1. The assessment of basic or fundamental skills of literacy. There is an urgent need in education to establish the minimal competencies that can be expected in elementary and secondary education. "A common and persuasive thread" running throughout a series of seminars conducted by the College Board was the belief that "while some reform and more creativity were needed in the admissions process, the real obstacles to equal educational opportunity were rooted far down in the grades, in the elementary and secondary schools (p. 31)." This consensus is a plaintive echo of a conclusion reached much earlier by the Carnegie Commission on Higher Education (1970) in recommending that "the first priority in the nation's commitment to equal educational opportunity" should be "increased effectiveness of preelementary, elementary, and secondary education programs."

2. The assessment of academic competencies in general education. A significant feature of the decline in liberal or general education is the absence of consensus about the competencies that should be evident in individuals who are liberally educated. The Carnegie Foundation (1977) has recently written of "advanced learning skills" that should be acquired by college students. "The competent college student" has been described by four seasoned scholars for the Tennessee Higher Education Commission (1977). Both publications are explicit in their disappointments concerning the decline of general education and the unflattering intellectual skills evidenced by many college graduates.

3. The assessment of academic programs at the college level. Declining test scores and grade inflation are part of a larger picture suggesting that a college degree no longer has the mettle it should have. This has produced, in return, a demand for program assessment at the baccalaureate level. Departments of academic instruction are challenged to demonstrate the value or worth of the programs they provide students. Greatly needed are tests and assessment techniques that will permit a better understanding of what students have learned in college

and how well academic programs have enabled them to realize their learning needs and interests. (See Academic Degree Program Assessment, 1977).

4. The diagnosis of learning difficulties. Although an avowed purpose of testing from the beginning, most standardized testing in recent years has failed to provide useful information about the actual difficulties students may have in learning what schools and colleges are trying to teach. Compensatory or remedial programs have failed because diagnostic resources and capabilities simply were not adequate. Instructors in developmental or special studies greatly need diagnostic information about student learning difficulties that will permit them to plan and organize remedial efforts. Teachers cannot pinpoint student errors, deficiences, and weaknesses because they so often lack systematic, functional methods and materials. The efforts of national testing agencies to develop more applicable instruments for diagnosis is indicative of a "growing market" for tests more closely related to learning difficulties.
5. The assessment of learning outcomes. In addition to testing that will help diagnose learning difficulties there is a need for testing that will provide useful information about student progress

under conditions of conventional instruction. Systematic testing is needed at frequent stages of education to inform both students and teachers about the accomplishment of educational objectives. Statewide assessment programs now provide better information about educational progress than they have in the past, and systemwide testing in higher education is beginning to establish levels of performance that must be met at entry, mid-program, and exit points. There remains, however, too much confusion about testing or assessment objectives, how they relate to educational objectives, and the specific uses and applications that will be made with testing or assessment results. Greatly needed are assessment procedures that will tell students and their parents how well the students are progressing in school, identify important educational objectives they are not meeting, and suggest ways students can get back into full scholastic stride.

6. The improvement of instruction. A frequent criticism of statewide assessment is that test results do not give the classroom teacher information of a sufficiently detailed nature at a time the teacher can actually use that information to help students. The instructional benefits of assessment are thereby

often lacking, and the actual value of the assessment effort is not what it should be to teachers. Much needed are assessment concepts, principles, and procedures that can be accommodated within a framework of instructional policies and practices. In brief, there is a need for testing that will tell instructors how well their particular teaching efforts are reaching students. While teacher-made tests, exams, and quizzes presumably provide this information, the testing and examining skills of most teachers and college instructors remain highly suspect (Milton & Edgerly, 1977). Over 25 years ago, Ralph Tyler (1951) suggested that testing should help teachers: (1) identify educational objectives, (2) select content, learning experiences, and procedures of instruction, and (3) coordinate instructional efforts. Testing and teaching should, once and for all, be brought within a workable framework that serves educational purposes.

7. The facilitation of learning. Although overlapping to some extent other testing needs, the facilitation of learning is important enough to bear repetition. Irrespective of other testing purposes and intents, assessment efforts should never lose sight of learning. Little has happened to alter the commendable viewpoint (Cook, 1951) that testing ought to:

(1) help adapt the curriculum to individual aptitudes and abilities, (2) help adapt instruction to specific accomplishments and deficiencies, and (3) provide motivation for better learning. In short, instruction should serve learning -- and testing should serve both. More recent research into the interactions of learning behavior and teaching efforts suggests that the situation is far more complex than once imagined but not hopeless (Cronbach & Snow, 1977).

Complementary Methods and Approaches

It is unfortunate that Regents v. Bakke has focused too narrowly on the admissions function in education. And it is unfortunate that there is more to read between the lines than within. Be that as it may, there are implications in Bakke that are being carefully considered by those charged with admission responsibilities. If Bakke is a confrontation between individual and group rights, the ruling would seem to indicate that the individual has rights that may not be denied by group considerations. If race is a relevant consideration for the individual but not for groups, it would seem to be an experiential factor that has direct relevance for the individual's aspirations and his or her expectations for success. And if the diversification of admissions criteria is now required by public policy, there must be full recognition that: (1) single standards will no longer suffice, (2) there must be alternative routes to commonly desired destinations, and

(3) much of the decision data will inevitably be subjective, intuitive, or "soft" but must be intelligently applied.

Justice Powell writes of "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important." His list would appear to include many qualities that admission procedures have often claimed to consider -- qualities or characteristics that standardized tests are often criticized for not tapping or adequately measuring. But more importantly perhaps, his ruling states that the courts do not compel institutions to use only "the highest objective academic credentials" for admission to their educational programs. If fully granted and if the "achievement of diversity" for educational purposes is to be an admissions function, institutions of higher education must prepare to deal with human qualities that are "complementary" to those that can be handled within traditional testing contexts.

The development of complementary methods and approaches in admissions should be predicated on a "principle of complementarity" yet to be articulated. There should be explicit recognition and acceptance of the possibility that other ways of looking at applicants and their promise for further growth and development are not only desirable but necessary. Much of this is implicit in all that has transpired in the past 15 or 20 years, but it must be gleaned from vague, often ineffectual, efforts to define pluralism and diversity in a democratic

society that would yet claim to be meritocractic. Whatever pluralism and diversity may mean, it must surely acknowledge that academic standards and credentials can no longer be singular or uniform. "Cut-off scores" ought to be as obsolete as the dodo.

An occupational hazard for admissions officers and committees has always been the charge of "a double standard" and there will always be faculty members who won't understand why athletes and music majors "can't meet the same admission standards everyone else does." Efforts to establish pluralistic admission criteria are suspect and further litigation claiming "reverse discrimination" may or may not clarify the issue in the future. The point remains that public policy now influences significantly the admission policies of institutions of higher education but does not completely dominate. Colleges and universities still have appreciable "elbow room" in working through the conflicting demands of social and educational policy.

It would be most desirable if institutions of higher education could search for complementary methods and approaches without litigious harrassment and unrealistic expectations. If they are to succeed, they must be permitted to fail. Colleges and universities must remain free to experiment without paying "court costs and damages."

Equally important is the clear possibility that if complementary methods are sought, some of the decision rules

and bases for human judgment will be contradictory to conventional or traditional criteria. The possibility of contradiction is implicit in a principle of complementarity and would simply mean that some applicants were admitted for one purpose under one set of admission criteria and others were admitted for another. The two sets of admission criteria may or may not overlap and may be completely orthogonal when viewed from a third perspective. It will all smack of double talk, and listeners -- in court and out -- must be patient.

In summary, testing remains a potent source of aid and assistance for the improvement of education -- if properly conceived and rightly used. But not only should there be other uses and applications of testing in education, there should be a serious effort to develop complementary approaches and procedures serving some of the same purposes. Selective admissions will continue to be a fact of academic life and group conflict shows no signs of lessening in contemporary society. A part of the challenge is to keep the issues open long enough to work out an eventual resolution.

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BAKKE AND BEYOND

THE ROLE OF TESTING IN AFFIRMATIVE ACTION

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The Role of Testing in Affirmative Action

Winton H. Manning

Opening

The eyes of the world have in recent weeks turned to Rome where two recent conclaves of the College of Cardinals have occurred. It may have escaped your attention that among the princes of the Church that gathered in solemn council is one who bears the name of Cardinal Sin--Jaime Sin of the Philippines, to be exact. If the Church has seen fit to include a Cardinal Sin in its conclave, I suppose the planners of this conference should be forgiven for seeking out a psychologist and researcher whose career has been intimately connected with testing, to address this conference.

I am your Cardinal Sin, because as you shall shortly see, I will be presenting some technical research data to you--a style of presentation that is distinctly not eloquent or moving in the way demonstrated by our speakers of this morning.

Despite the turmoil, and the fitful progress of the past decade, it is clear to all of us that the task creating equal educational opportunity is hardly begun. A few statistics will illustrate the progress, and the gap that remains to be closed (CEMREL, Inc., 1978).

- In 1950, Blacks were completing only a median of 8.6 years of education. An astounding 80% dropped out of high school and only 20% graduated. By 1977, Blacks completed a median of 12.6 years of schooling, vs. 12.9 for all persons. The drop-out rate fell from 80% to 26%, and the percentage of high school graduates had increased to 74% (as compared to 85% for all persons)--a threefold increase over these 27 years.

- In 1960, 18 and 19 year old whites were twice as likely to be enrolled in college (30% vs. 15%.) By 1975, the rates had increased for

both groups, but whites were still 50% more likely (38% vs. 25%) to be enrolled in college. Over this same period, discrepancies in white/black college graduation rates shifted from a ratio of 5:1 to a ratio of 3:1 --still a large gap.

- More sobering is the fact that nationwide, about 11% of all children under 18 years of age still lived in poverty, but 40% of Black children are in poverty families and Black family income is still only about 60% of white.

These and other statistics are familiar to you, but it is useful to be reminded of the enormous gap which still remains in educational opportunity and resources between majority and minority groups.

Given these circumstances, it would indeed be surprising if ability tests, which reflect the cumulative effects of educational experience of students over 12 to 16 years of schooling did not also reflect differences between the white majority and minority groups who are still beset with poverty, discrimination and the multi-faceted effects of social class and caste systems. Nevertheless, controversy rages around the question of the role of tests in college admission. Indeed, controversy over the role of tests has characterized educational debate for over 75 years.

This is an exceedingly complicated topic--yet perhaps not so confounding as it may seem to be, if we approach the issues from the standpoint of data, rather than rhetorical argument.

I propose to approach the problem in this way, by dealing with four aspects of the problem--aspects that have been illuminated by the Bakke case.

The four problems I want to address are:

1. The strengths--and limitations of tests; that is, what do we know about the validity and fairness of admissions tests;

2. The problem of strengthening "soft data," that is, what is the state of affairs regarding use of other data used in reaching admissions decisions, such as interviews, and other subjective (rather than objective) assessments;

3. The problem of ensuring diversity in the community of learners, that is, what are some of the social consequences of pursuing one strategy or another in admissions;

4. The need for incorporating the concept of educational due process in admissions.

1) Validity of tests:

- Are tests valid?
- How well do they predict success in college or graduate school?
- What factors influence observed validity?
- Are tests biased against minority groups?

These are samples of questions that are endlessly debated, it seems. I'd like to walk through a series of slides in order to set a context for our discussion of these issues.

[Slides] - See Appendix

Allow me to summarize these points concerning validity and fair use of tests in admission.

- The predictions based on tests and grades are not biased against minority groups.

- We must remember the tests and grades do not fully define what we mean by talent, nor are they by any means infallible.

- So far as tests and grades are concerned it is a vain hope, at this stage in our development as a society, that the numbers will conveniently arrange themselves so that we can avoid questions of race and affirmative action in admissions.

- The convenient rationalizations one so often hears about tests may reflect an unwillingness to face up to the issue of affirmative action. A commitment to the effort to bring victims of racial discrimination into the mainstream of education and the professions requires a decent sense of outrage--if there is a will, a way can be found.

- The real barriers to affirmative action are not tests but complacency and lack of courage of many leaders in education. Now that the court has said race may be taken into account--are we willing to do so? Are we committed to do that? That is the root question.

2) Soft Data

I would now like to move on to consideration of the role of other assessments of candidates for admission--assessments that some have termed "soft data" of admissions.

In my report for the Carnegie Council (1977), I urged the importance of using additional admissions criteria beyond test scores and grades, not because these objective measures are invalid--their usefulness has been

demonstrated through hundreds of research studies--but because I believe it is important for institutions to have a broad view of talent, and that they give appropriate attention to those personal characteristics of studies that they believe to be especially relevant to the unique objectives of their programs.

Now that we have the Bakke decision, it is even more critical that institutions develop and maintain a wide variety of admissions information that is defensibly relevant to the institution's objectives. Many criteria beyond test scores and grades are used at present, though their use is often subjective and unsystematic. In this sense, they are the "soft data" of admissions because they are typically not objective or quantifiable, and they are vey often unreliably observed.

Let me elaborate a bit more on what I mean by "soft data" in admissions. I would suggest that the term might usefully refer to information relevant to the admission of students that is not readily scored or quantified, but is subject to reliable assessment under proper conditions. In general this means reliance on informed, systematic judgment. A prime example would be the admission officer's holistic impression of an applicant's character and background based upon: interviews, recommendations, autobiographical essays, records of experience, outstanding accomplishments, and evidence of unusual strength of character, or sheer doggedness in the face of obstacles (including especially racial experience in contending with obtacles of discrimination,) etc. What is too often the case now is that such judgments are not systematic, nor are they checked for evidence of reliability or validity--paradoxically, the use of expert judgment in admissions is fairly primitive even though widely used.

What needs to be done? If such supplemental criteria are to receive adequate emphasis in selective admissions, the rationale and justification must be carefully and convincingly demonstrated in relation to accepted objectives of institutions. Appropriate assessment methods will need to be developed. Some of these new assessments will need to be designed so that they can be carried out locally; some will likely need central support services from testing agencies. In the current climate of public scrutiny of the admissions process, great care will be necessary to implantnew assessment procedures in an admissions process that has desirable characteristics.

This is a large task that will require very substantial research and development of the most practical sort. It will take time and it will require the close involvement of institutions. I believe it is an inevitable adjustment higher education will have to make, but it is not likely to be easy. But, I feel it is critically important to strengthen the "soft data of admissions," and to move to a broadened view of talent, and more defensible procedures in selecting students who have the personal qualities and characteristics that fit the educational objectives and responsibilities of higher institutions.

3. Ensuring Diversity in the Community of Learners

I would like now to turn to the matter of ensuring diversity in the student body - a concern addressed in my Carnegie report, and given considerable attention in the opinion of Justice Powell in Bakke.

All knowledge is shared experience; its acquisition is an overwhelmingly social act. But the business of higher education is not exclusively concerned with the transmission of a cultural heritage of knowledge and

skills, as important as this may be. The provision of conditions that promote the development of the inner resources of the individual is equally important. The question of what should be the basis for admission to college, or graduate and professional schools is intimately related to the problem of creating the optimal conditions for assuring (1) the transmission of information from society to its novices, and (2) furthering the individual's potential for self-development.

Of these two objectives, the first may be less dependent for its realization on the existence of a particular community of persons who contemporaneously share in the process of learning, while interacting together in a social group. Indeed, neither the movement toward independent study, nor the increasing automation of learning by means of computer assisted instuction would be possible if this were not so.

The second objective, that of self-discovery, personal growth, and the acquisition of attitudes and values necessary to function as a lifelong learner depends in many ways upon the participation of the individual in a community of persons, who serve both as stimuli and as setting for this kind of learning and development.

As Justic Powell pointed out, much of learning (and socialization into a profession) is dependent on interactions between and among students and faculty. But we must bear in mind that diversity in admissions creates only a paotentiality for "community." The contribution of diversity cannot be realized in practice unless the educational program deliberately links this potential of diversity to create within students a new breadth of vision, an openness to ideas from unfamiliar sources,

and an increased awareness of the pulls and tugs in a society that appears to have no uniform aspirations. Efforts to achieve diversity in admissions, particularly racial and ethnic diversity, are properly conceived as a foundation upon which institutions may build, in their effort to provide true excellence in educational programs.

Present admissions procedures are heavily weighted toward the first of these objectives - the transmission of knowledge - in that the use of grades, and aptitude and achievement tests is predicated on the assumption that information transmission will be more optimally carried on if the community of learners is reduced to some degres in its variability and matched to the demands of the institution's curriculum. Furthermore, information transmission is conceptually more closely allied to cognitive domains and for that reason we typically find the substantial validity of cognitive ability measures for achievement staturated criteria.

The process of recruiting and admitting students should, it seems to me, also promote the formation of communities of learners that would ensure a wide diversity within different environments for learning, and would nurture a broad range of personal and societal objectives beyond information transmission alone. The question of formulating supplementary or alternative bases to achievement and ability measures is, therefore, most properly addressed as a need to respond to both of these two fundamental objectives of higher education--personal development as well as transmission of knowledge.

A principal promise of assessment of soft data, used in combination with grades and tests of aptitude and achievement, may be in assisting students to seek and find learning environments that foster personal

self-development as an objective as worthly of attainment as the traditional goal of transmitting knowledge. Admissions information systems that mediate student and institutional decisions within this exanded framework constitute a means for making the process of admission more planful and rational, recognizing that values, attitudes and a sense of purpose are as necessary to effective functioning as an educated person as command of a body of knowledge.

I should now like to turn to consideration of another "message" of the Bakke case--the critical imporance of developing the concept of "educational due process" in admissions. (Manning, 1977; Gellhorn and Hornby, 1974, Willingham, 1978)

4. Educational Due Process in Admissions

In my paper for the Carnegie Council I made the following statement:

> "Bakke has cast a cold and relentless beam of light upon an area of institutional policy making--admissions--that has for too long lingered in the shadows. It is not merely for the benefit of applicants that admissions policies and procedures need illumination. Rather, the gatekeeping function of higher education requires that connections between stated institutional missions and goals on the one hand, and admissions policies and procedures on the other, be understood by various constituencies the institution serves. Some process akin to accreditation may be needed, in which an institution's admissions policies, procedures and practices are documented, carefully assessed, and publicly evaluated by independent authorities. If the pursuit of fairness in admission to higher education is to have

> lasting, practical significance ... admissions--no less than other areas of educational policy--should demonstrably express the values of the larger society, not only at the level of broad generalizations, but at the level of specific working principles." (Manning, 1977, p. 41-42)

Higher education institutions can legitimately claim rights to autonomy and broad discretion in their admissions decisions. Nevertheless, both Bakke and De Funis have revealed some practices that need to be strengthened and others that need to be abandoned. A primary consideration that must govern admissions policies, I believe, is a concept of "educational due process," as I called it in my Carnegie Council paper. Unless the concept of "educational due process" is articulated by higher education, and incorporated into their policies, we risk the stultifying consequences of the litigation that will ensue. The lack of demonstrable, systematic, clearly documented guidelines for making judgments about applicants is a keenly felt issue in all quarters of society. It would be infinitely preferred for institutions voluntarily to strip away the curtain of obscurity that too often veils their actions in admissions rather than to look to resolution of these matters in the courts.

I believe that educational due process requires that institutions adhere to ten Principles of Good Practice in Admissions. These are:

1. Educational institutions should clearly describe their admissions policies and explicitly state how these policies are related to the goals and objectives of the institution.

2. Institutions should publicly describe their admissions criteria, and provide information to applicants sufficient to permit students to make a reasonable estimate of the likelihood of their meeting these standards.
3. Whatever criteria are used, the educational institution should routinely allow applicants the procedural opportunity to demonstrate that those particular criteria or standards are inappropriate for assessing their qualifications.
4. Institutions should use the same admissions process for all candidates considered for the same program.
5. Where exceptions to uniformity of process, criteria and standards are made for particular classes, of applicants, this policy should be publicly articulated with particular attention to the legal restraints on such actions.
6. The criteria employed in the admissions process must be validated--that is, demonstrably shown to measure qualities relevant to the legitimate educational objectives of the educational program. Additionally, criteria should not be used which cannot be shown to be reliably assessed.
7. Upon request, a rejected applicant should be given a statement of the reason(s) for his or her rejection, and a means of appeal by the applicant if he or she challenges the institution's explanation.
8. Selection criteria used by institutions should represent a reasonably broad array of those qualities shown to be relevant rather than relying solely upon a single index of competence derived from ability tests and grades.

9. Institutions should ensure that all those who particpate in the process of implementing admissions decisions are trained and competent to perform the complex task of evaluating candidates for admission in a fully satisfactory way.
10. Institutions should periodically invite external audit of their admissions policies and practices in order to assure the public and other constituencies that the process that actually goes on is in conformity with publicly stated policies, principles and procedures.

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Implementation of these principles will not be easy. It will require that many higher education institutions make a substantially larger investment of resources in the conduct of the admissions process than they are accustomed to do. For some institutions, it will require a major overhaul of their policies and practices, entailing an even larger financial commitment--not an easy step to contemplate in these days of lean budgets.

Conclusion

These four broad "messages" of the Bakke--using tests wisely - not woodenly-- strengthening the soft data of admissions, recognizing the role of diversity in creating a lively community of learners, and implementing concepts of due process in admissions--exist in some tension with one another. It is often the "soft data" whose use is hidden from public view; thus secrecy serves to cloak unreliable--even arbitrary--actions. Yet it is by way of the "soft criteria" that the vitiating effects of a narrow, wooden admissions policy are avoided. Efforts in all four areas--improving test use, strengthening

soft data, and giving attention to the educational benefits of diversity in the community of learners and educational due process must be pursued as parallel efforts, for each is inextricably linked with the other, and all are necessary to the maintenance of institutional vitality and public confidence. Together they provide a foundation for the effort to create institutions that not only serve students and faculty, but the nation.

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Inservice Education Program
Education Commission of the States
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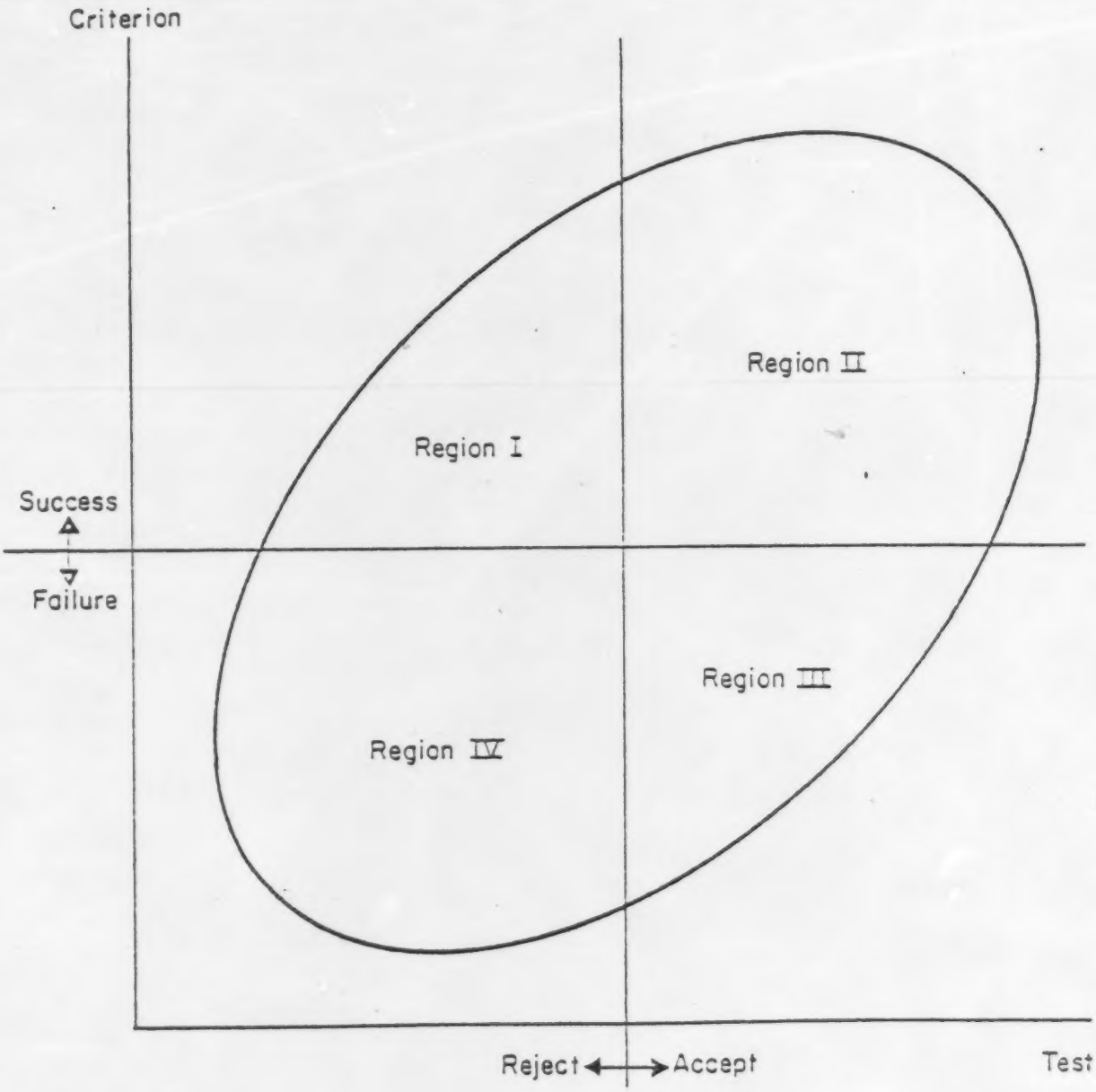
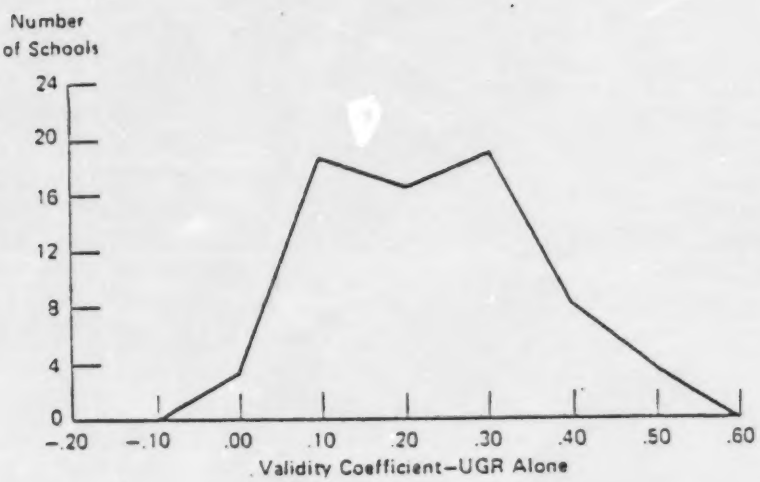

Criterion
Region II
Region I
Success
Failure
Region III
Region IV
Reject
Accept
Test

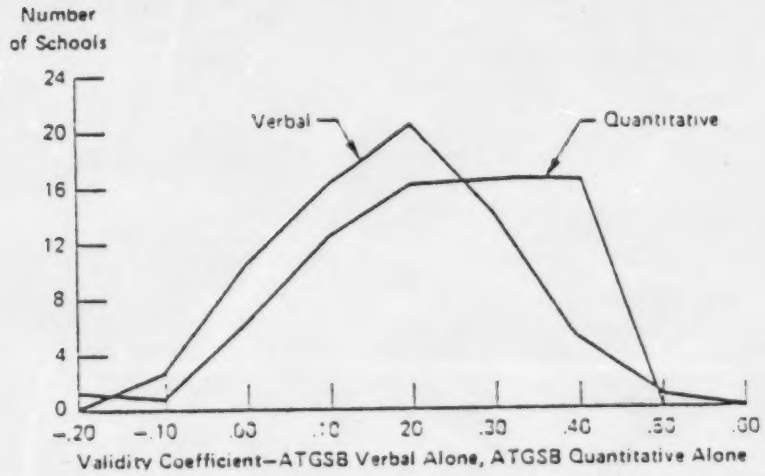
A-2

Median Validity Coefficients in a Representative Group of Studies Using Freshman Average Grade as the Criterion*

	Men	Women	Combined
SAT-V	.33	.41	.39
SAT-M	.30	.36	.33
High school record	.47	.54	.55
Multiple correlation	.55	.62	.62
Number of groups	116	143	51

*From Schrader, B. The predictive validity of College Board admissions tests, in Angoff, William F. The College Board Admissions Testing Program. New York: College Entrance Examination Board, 1971.)





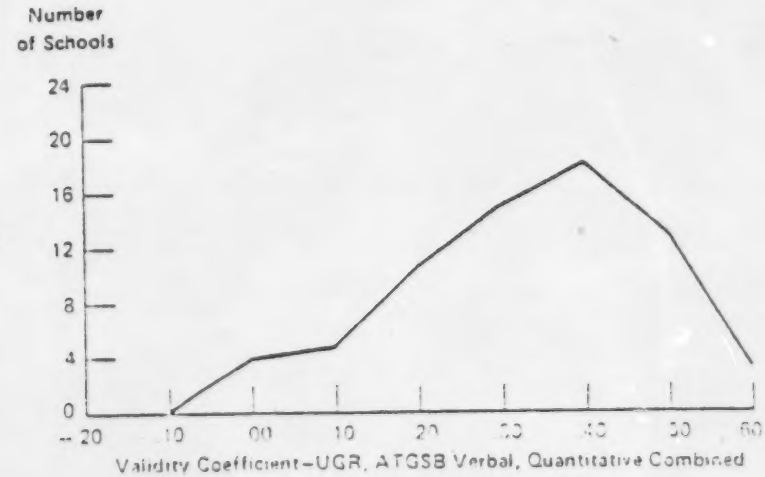
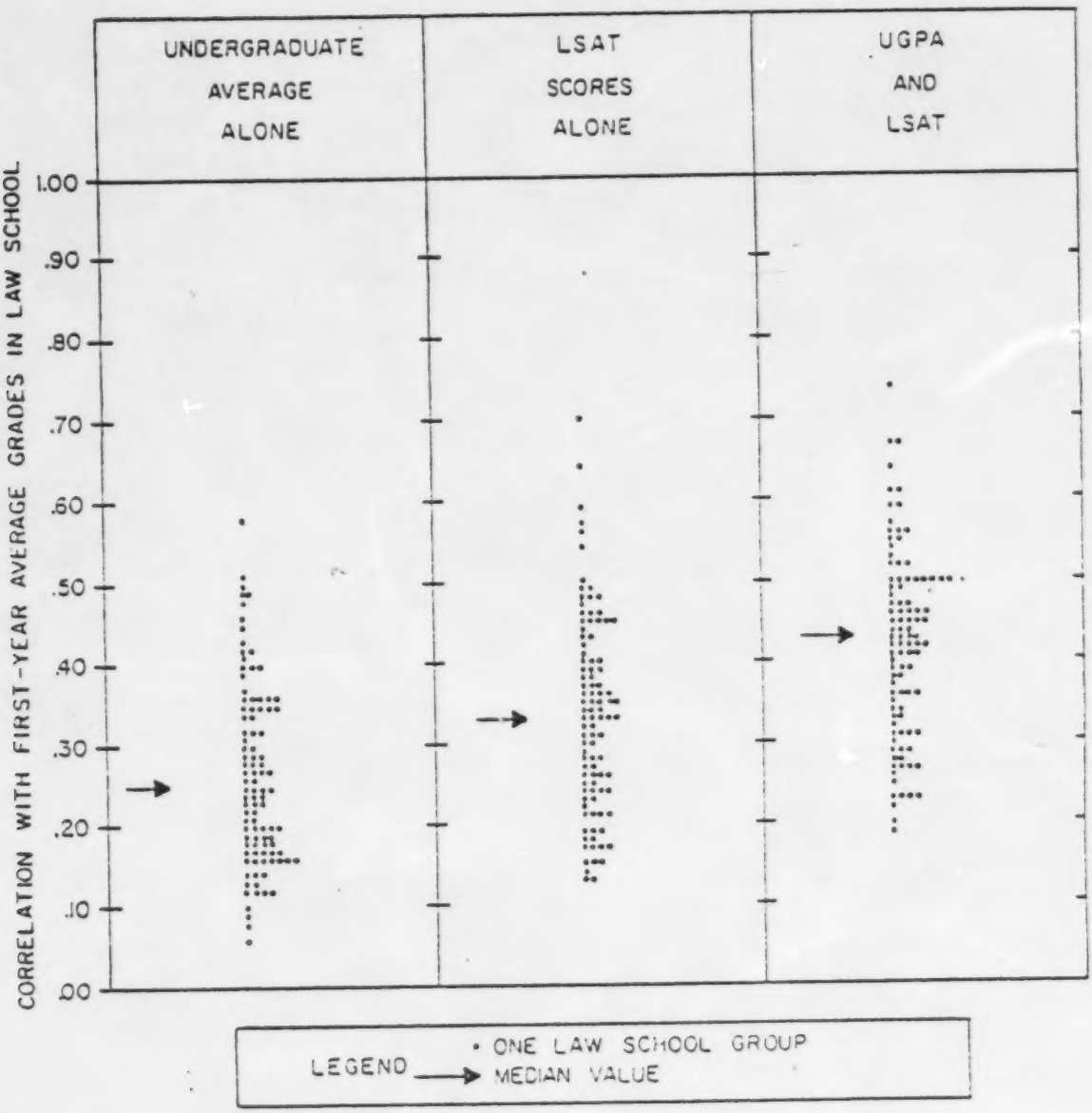


FIGURE 1

Distributions of validity coefficients for undergraduate record alone, ATGSB Verbal scores alone, ATGSB Quantitative scores alone, and UGR and ATGSB V and Q scores combined. (Based on 69 studies conducted in 1967-68--1969-70 for 67 graduate schools of business.)



Validity coefficients of undergraduate average alone, LSAT scores alone, and undergraduate average combined with LSAT scores. (Based on studies conducted in 1972-73 for 99 law schools.)

Table 1. Median validity coefficients for various predictors and criteria of success in graduate school. (The number of coefficients upon which each median is based is given in parentheses. Coefficients involving dichotomized criteria were sometimes reported as biserials and sometimes as point-biserials.)

Predictors	Criteria of success				
	Graduate GPA	Overall faculty rating	Departmental examination	Attain Ph.D.	Time to Ph.D.
GRE-verbal	.24 (46)	.31 (27)	.42 (5)	.18 (47)	.16 (18)
GRE-quantitative	.23 (43)	.27 (25)	.27 (5)	.26 (47)	.25 (16)
GRE-advanced	.30 (25)	.30 (8)	.48 (2)	.35 (40)	.34 (18)
GRE-composite	.33 (30)	.41 (8)	*	.31 (33)	.35 (18)
Undergraduate GPA	.31 (26)	.37 (15)	*	.14 (30)	.23 (9)
Recommendations	*	*	*	.18 (15)	.23 (9)
GRE-GPA composite	.45 (24)	*	*	.40 (16)	.40 (9)

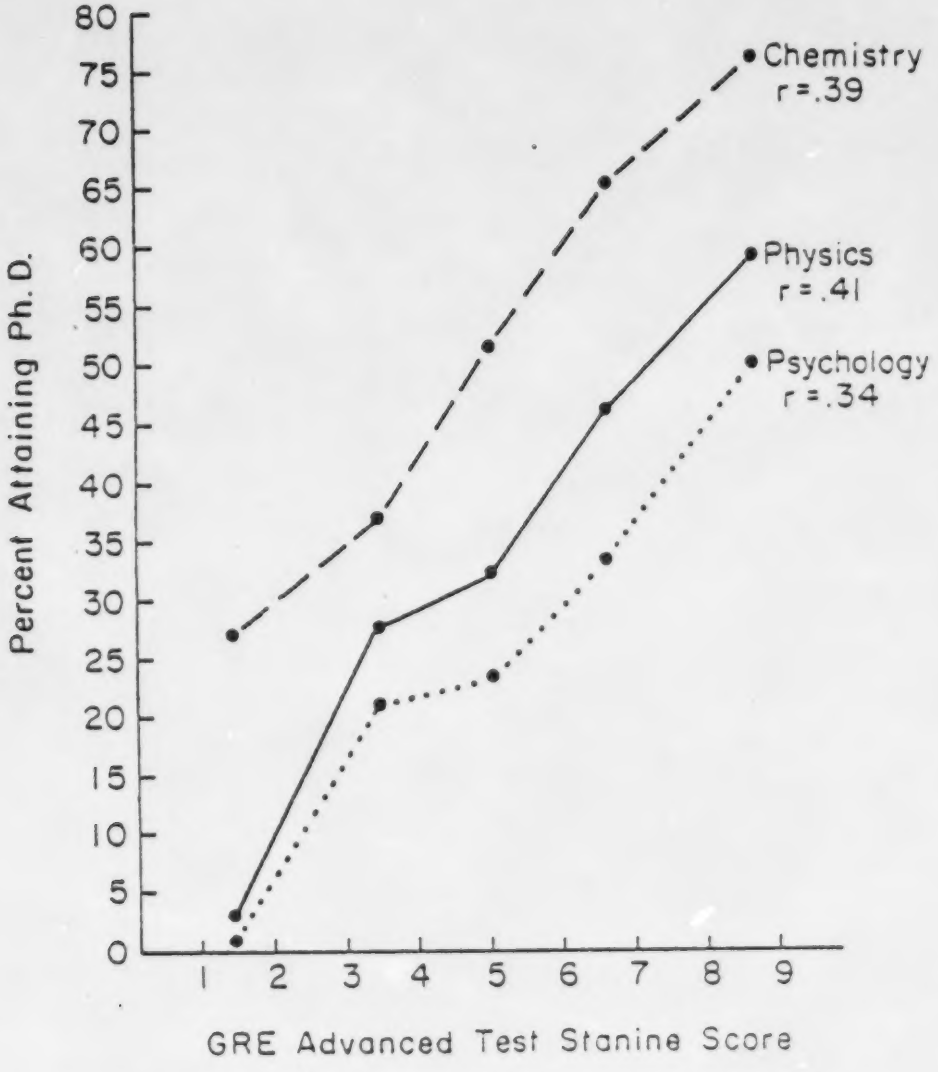
* No data available

Table 2. Median validity coefficients for five predictors of success in graduate school in nine fields. (The number of coefficients upon which each median is based is given in parentheses. Coefficients involving dichotomized criteria were sometimes reported as biserials and sometimes as point-biserials. In those sets of data where two criteria were included, one was selected in the following order of priority: GPA, attain Ph.D., departmental examination, and faculty rating.)

Predictors	Biological science	Chemistry	Education	Engineering and applied science	English	Mathematics	Physics	Psychology	Social science
GRE-verbal	.18(7)	.22(14)	.36(15)	.29(11)	.21(6)	.30(6)	.02(6)	.19(23)	.32(11)
GRE-quantitative	.27(8)	.28(13)	.28(14)	.31(10)	.06(6)	.27(6)	.21(6)	.23(22)	.32(10)
GRE-advanced	.26(5)	.39(9)	.24(6)	.44(7)	.43(3)	.44(5)	.38(5)	.24(17)	.46(5)
Undergraduate GPA	.13(2)	.27(7)	.30(5)	.18(4)	.22(4)	.19(4)	.31(4)	.16(15)	.37(6)
GRE-GPA composite (weighted)	.35(3)	.42(6)	.42(7)	.47(4)	.56(2)	.41(3)	.45(2)	.32(4)	.40(5)

D-5

Proportion of students at various levels of GRE Advanced test scores in chemistry, physics, and psychology who attained the Ph.D. within 10 years.#



From Creager, 1965 National Research Council Study.

SHRUNKEN MULTIPLE CORRELATIONS OF
SAT-V, SAT-M, and HSGPA for
GRADES IN VARIOUS COURSES

Regression Equations for Each Class*

	N	$\hat{R}$
Psychology	100	.44
Biology	33	.57
Chemistry	33	.49
Physics	68	.32
Sociology	20	.64

*(Goldman, R.D., and Slaughter, R.E., "Why College Grade Point Average is Difficult to Predict." Journal of Educational Psychology, 1976, 66, 1, 9-14.)

"In sum we believe that the validity problem in GPA prediction is a result of the GPA criterion rather than the tests that are used as predictors. Recognition of this phenomenon would eliminate much pointless argument about the merits of standardized tests for college selection." (Op. Cit., p. 14)

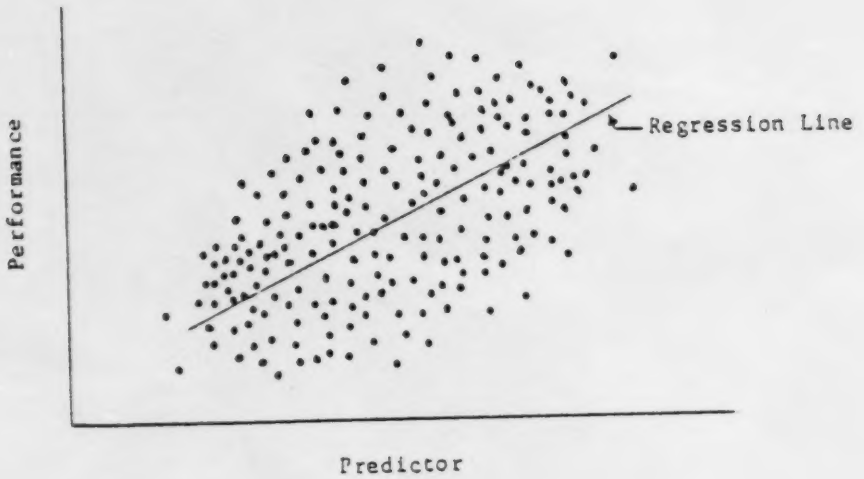


Figure 1. Prediction Without Selection

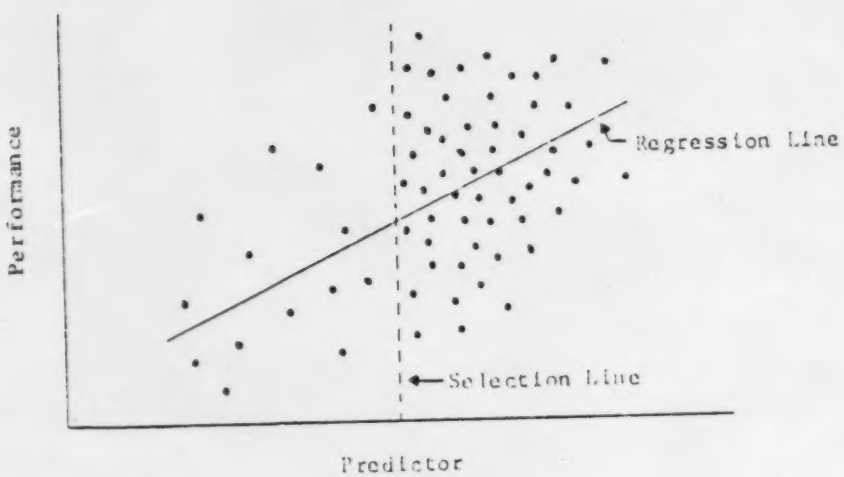
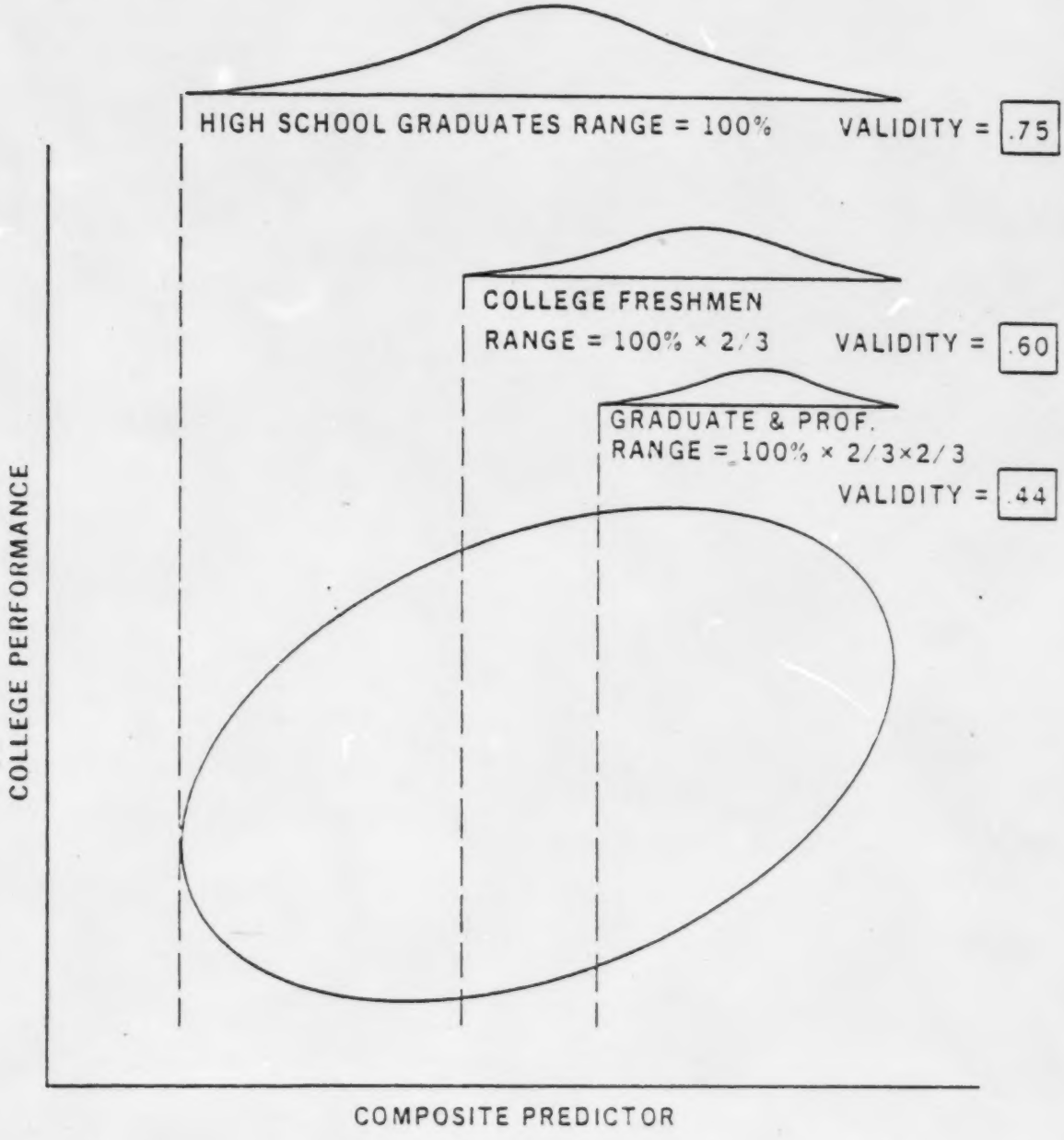


Figure 2. Prediction With Selection



Hypothetical example showing effect of restriction in range of talent on the size of the validity coefficient

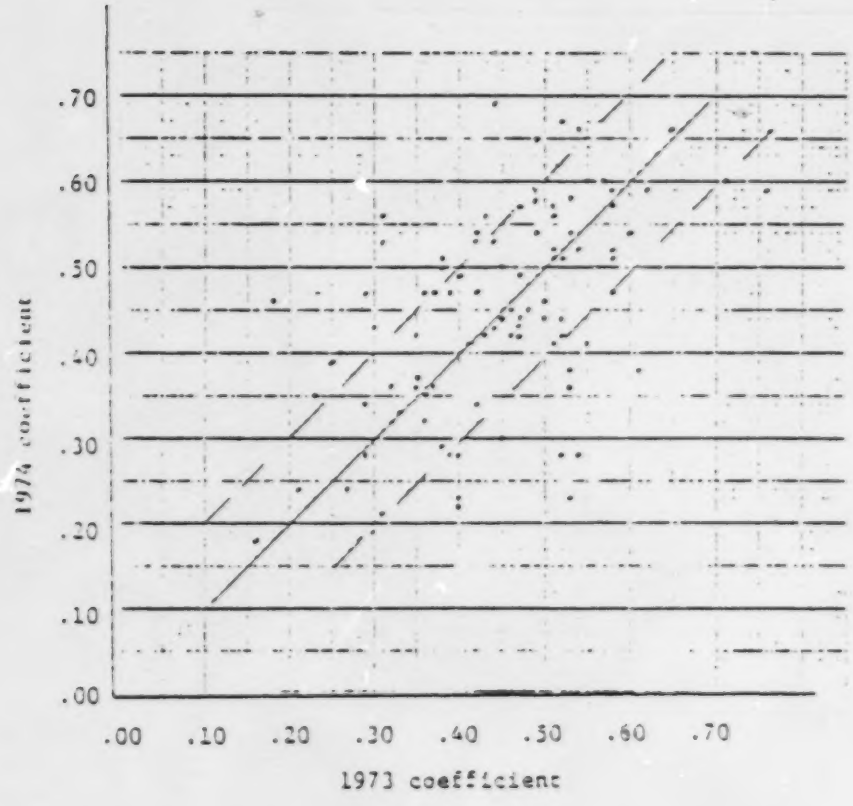
Range of Correlation Coefficients That Would be Expected to Include 95 Percent of Observed Values for Selected Population Values and Sample Sizes*

Population value of correlation coefficent	Expected range of observed coefficients when sample size is: 50	100	200
.40	.14-.61	.22-.55	.28-.51
.50	.26-.68	.34-.63	.39-.60
.60	.39-.75	.46-.71	.50-.68
.70	.52-.82	.58-.79	.62-.76

*Calculated using Fisher's z-transformation. Tables of z in McNemar (1962) were used.

(From Schrader, B. The predictive validity of College Board admissions tests, in Angoff, William F. The College Board Admissions Testing Program. New York: College Entrance Examination Board, 1971.)

Multiple validity coefficients (LSAT and UGPA) for two successive first year classes in 95 law schools (N's range from 90 to 500 and average about 175)



C-1

Table 1

Proportion of Successful Selectees as a Function of Validity and Selectivity*

Validity	Selectivity (Percent Selected) 5%	10%	20%	30%	40%	50%
.00	.50	.50	.50	.50	.50	.50
.05	.54	.54	.53	.52	.52	.52
.10	.58	.57	.56	.55	.54	.53
.15	.63	.61	.58	.57	.56	.55
.20	.67	.64	.61	.59	.58	.56
.25	.70	.67	.64	.62	.60	.58
.30	.74	.71	.67	.64	.62	.60
.35	.78	.74	.70	.66	.64	.61
.40	.82	.78	.73	.69	.66	.63
.45	.85	.81	.75	.71	.68	.65
.50	.88	.84	.78	.74	.70	.67
.55	.91	.87	.81	.76	.72	.69
.60	.94	.90	.84	.79	.75	.70
.65	.96	.92	.87	.82	.77	.73
.70	.98	.95	.90	.85	.80	.75
.75	.99	.97	.92	.87	.82	.77
.80	1.00	.99	.95	.90	.85	.80
.85	1.00	.99	.97	.94	.88	.82
.90	1.00	1.00	.99	.97	.92	.86
.95	1.00	1.00	1.00	.99	.96	.90
1.00	1.00	1.00	1.00	1.00	1.00	1.00

*Adapted from Tiffin, 1965, p. 652.

RELATION BETWEEN STANDING ON A PREDICTOR
AND STANDING ON CRITERION FOR VALIDITY
COEFFICIENTS OF .00, .40 and .60

Validity	Standing on Predictor	Percent of Students in Each Criterion Group		
		Bottom Fifth	Middle Three Fifths	Top Fifth
.00	Top fifth	20	60	20
	Middle three-fifths	20	60	20
	Bottom fifth	20	60	20
.40	Top fifth	7	55	38
	Middle three-fifths	18	64	18
	Bottom fifth	38	55	7
.60	Top fifth	2	48	50
	Middle three-fifths	16	68	16
	Bottom fifths	50	48	2

C-3

Hypothetical Expectancy
Table for School X

Score Level	CHANCES IN 100 OF EARNING VARIOUS FIRST-YEAR AVERAGE GRADES			
	Failing Grades	Passing Grades (Above Failing but Below Honors)	Honor Grades	Passing or Honor Grades
600-649	0	44	56	100
550-599	3	50	47	97
500-549	7	59	33	92
450-499	17	60	23	83
400-449	27	59	14	73
350-399	31	61	8	69
300-349	50	45	5	50

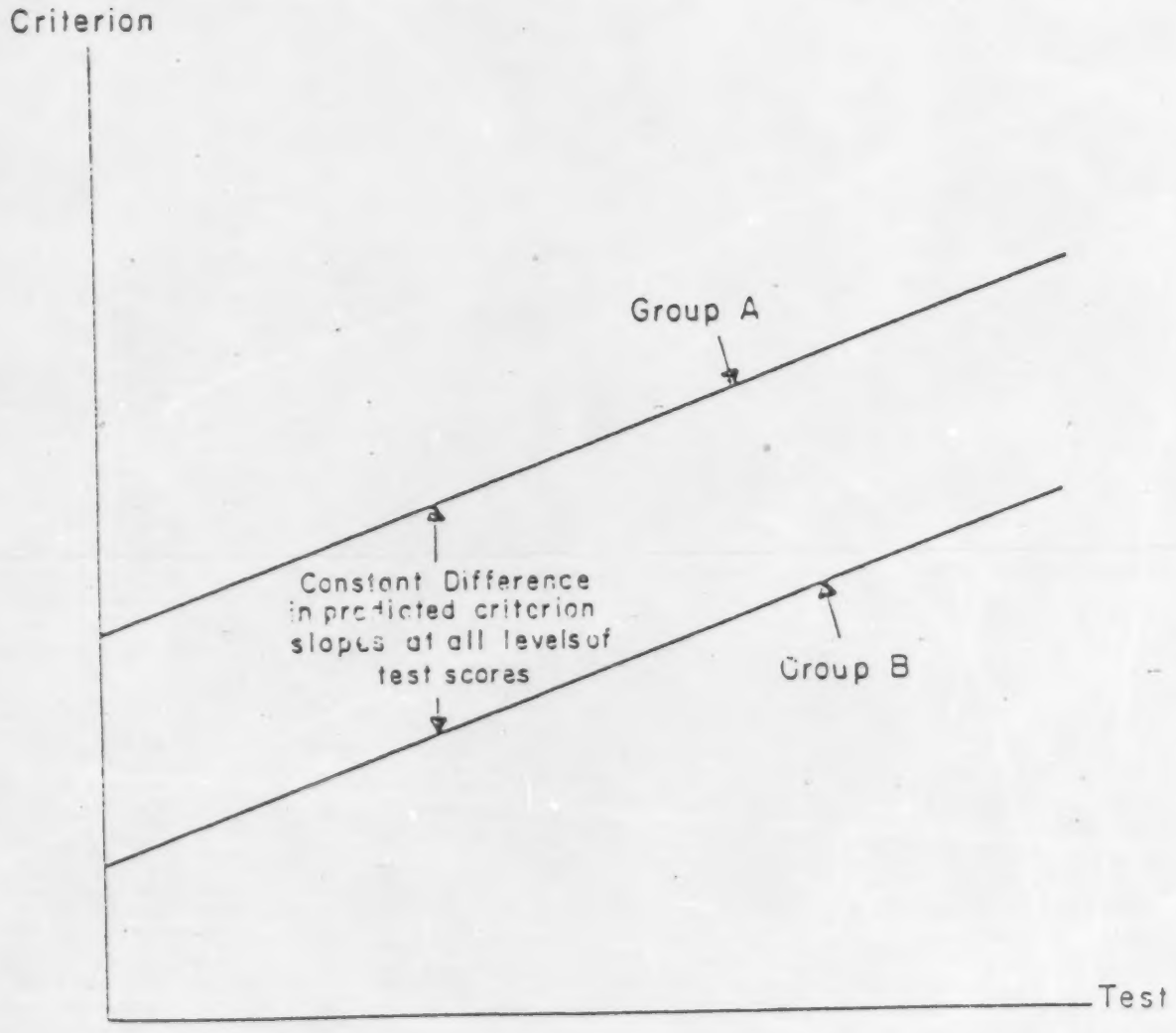


Figure 3

Illustration of regression lines with equal slopes but unequal intercepts

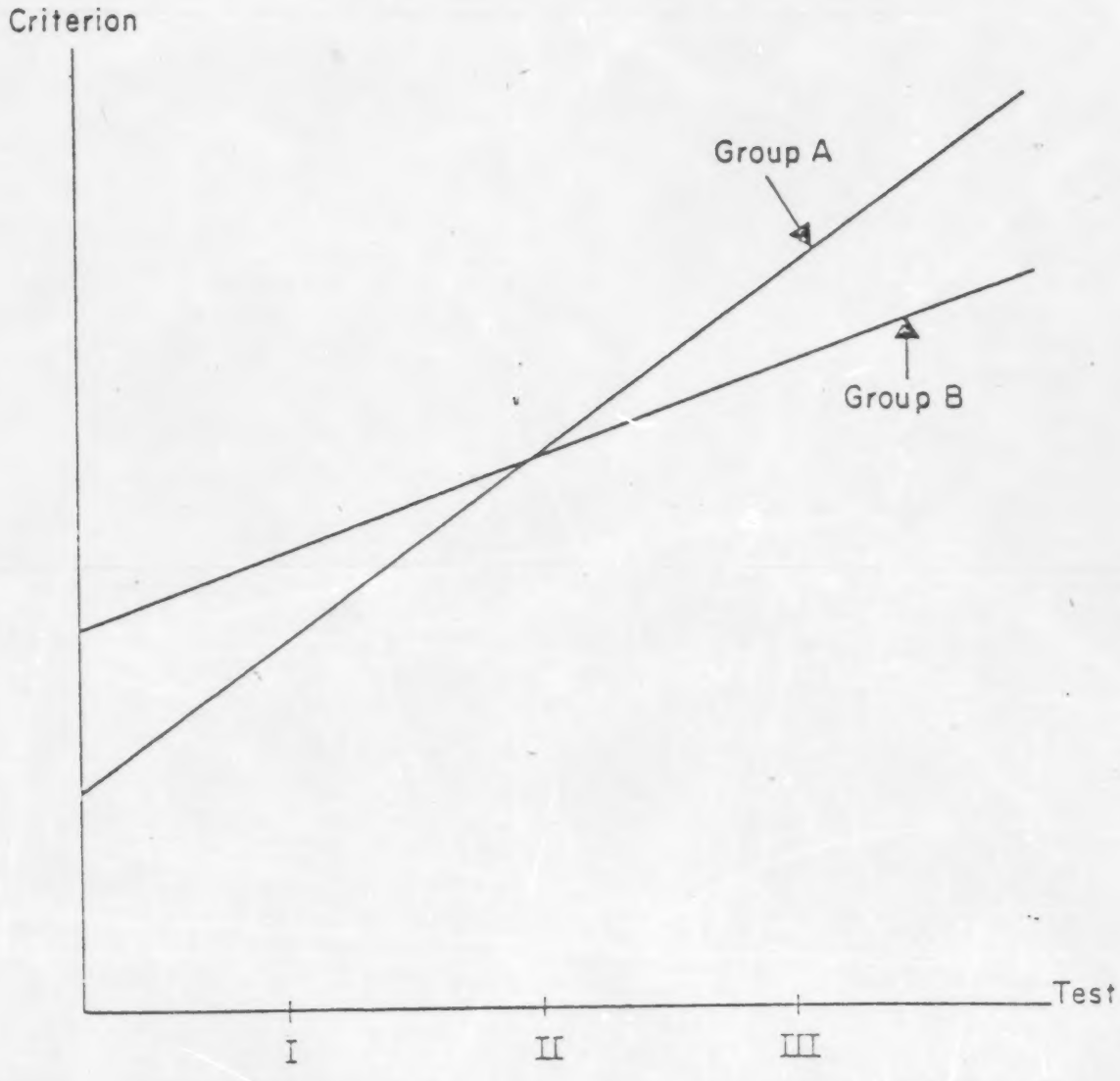


Figure 2

Illustration of regression lines with unequal slopes

Table 2

Predicted and Actual Grades for Black and Mexican American Students[a]

Study & School	Predicted Average Grade[b]	Actual Average Grade	Amount of Over-prediction
	Black Students		
II-A	39	36	3
II-B	42	37	5
II-C	40	38	2
II-D	40	36	4
II-E	40	38	2
III-D	36	33	3
III-E	39	36	3
III-F	39	37	2
III-G	44	42	2
III-H	40	36	4
III-I	38	33	5
III-J71	40	35	5
III-J72	40	36	4
	Mexican American Students		
III-A	40	36	4
III-B	49	44	5
III-C	41	38	3

[a]The predictions are based on UGPA and LSAT using the combined group consisting of the total black or Mexican American sample and the proportional white sample.

[b]Grades were scaled to have a mean of 50 and a standard deviation of 10 for the combined group of students within each school. Predictions are for UGPA and LSAT scores at the mean of black or Mexican American students within each school.

Figure 1

Cross-plot of Deltas for White-Northeastern

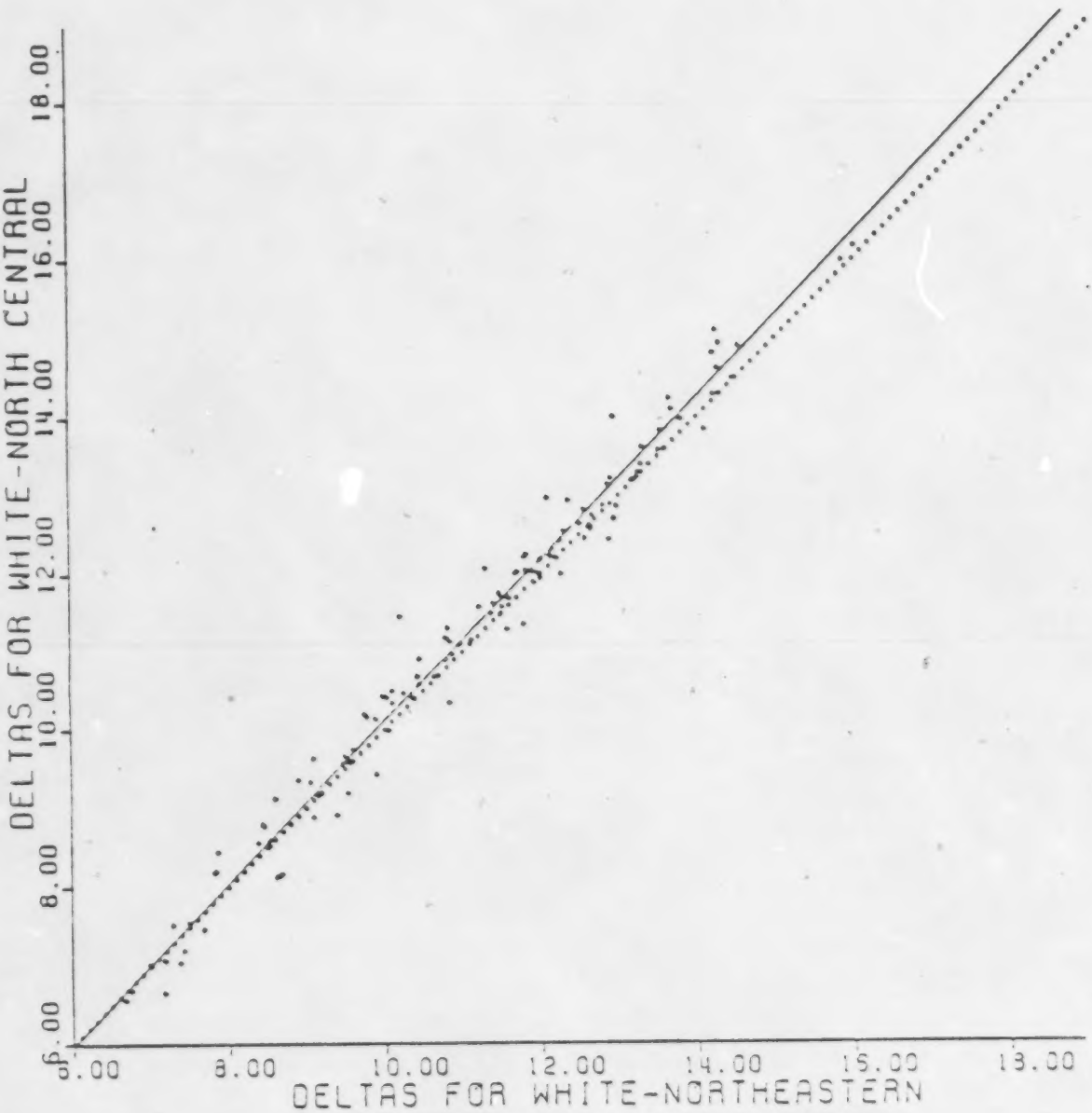


Figure 2

Cross-plot of Deltas for White-Southeastern

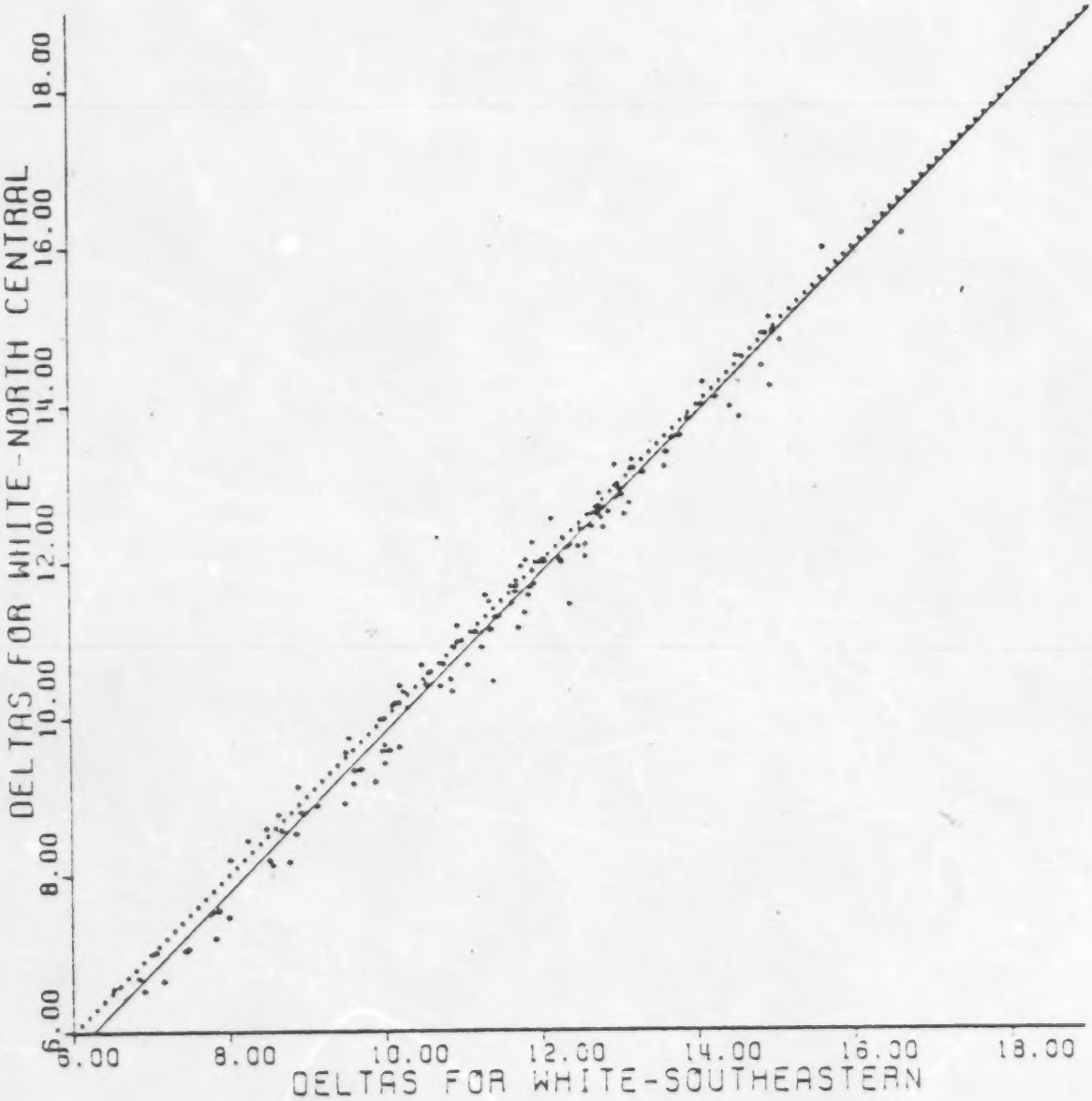


Figure 3

Cross-plot of Deltas for Afro-American

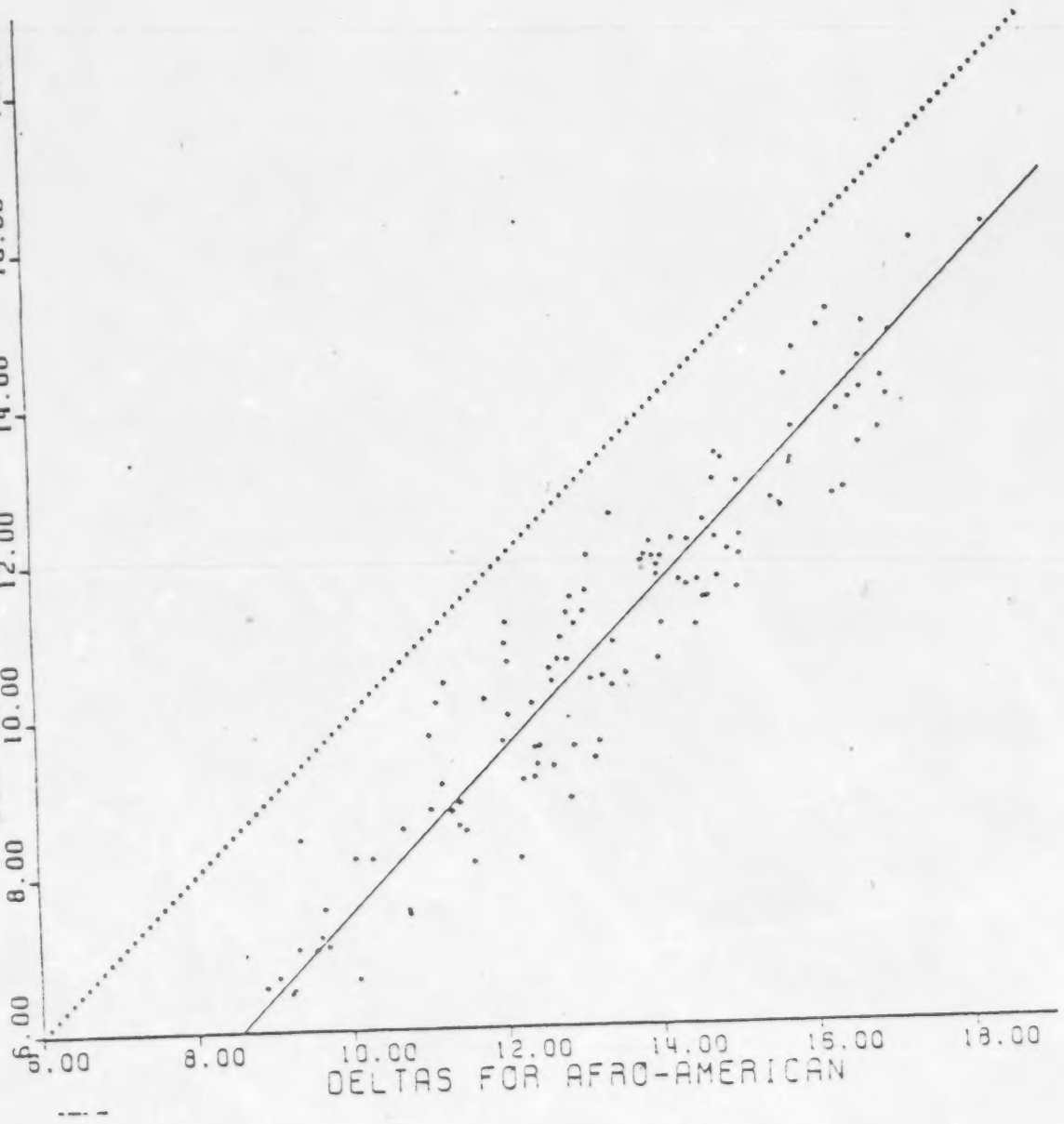


Figure 4

Cross-plot of Deltas for Puerto Rican

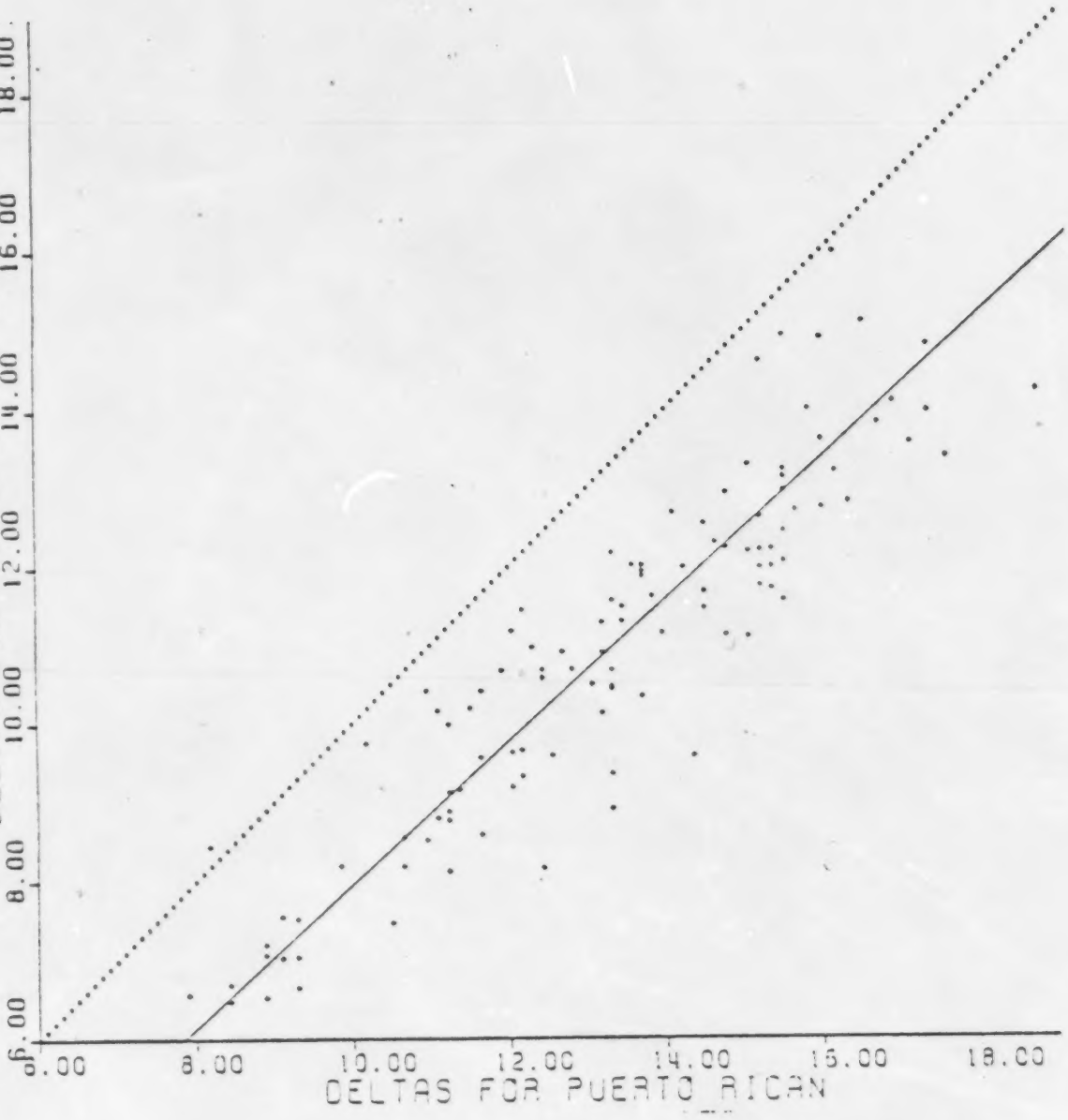


Figure 5

Cross-plot of Deltas for Mexican-American

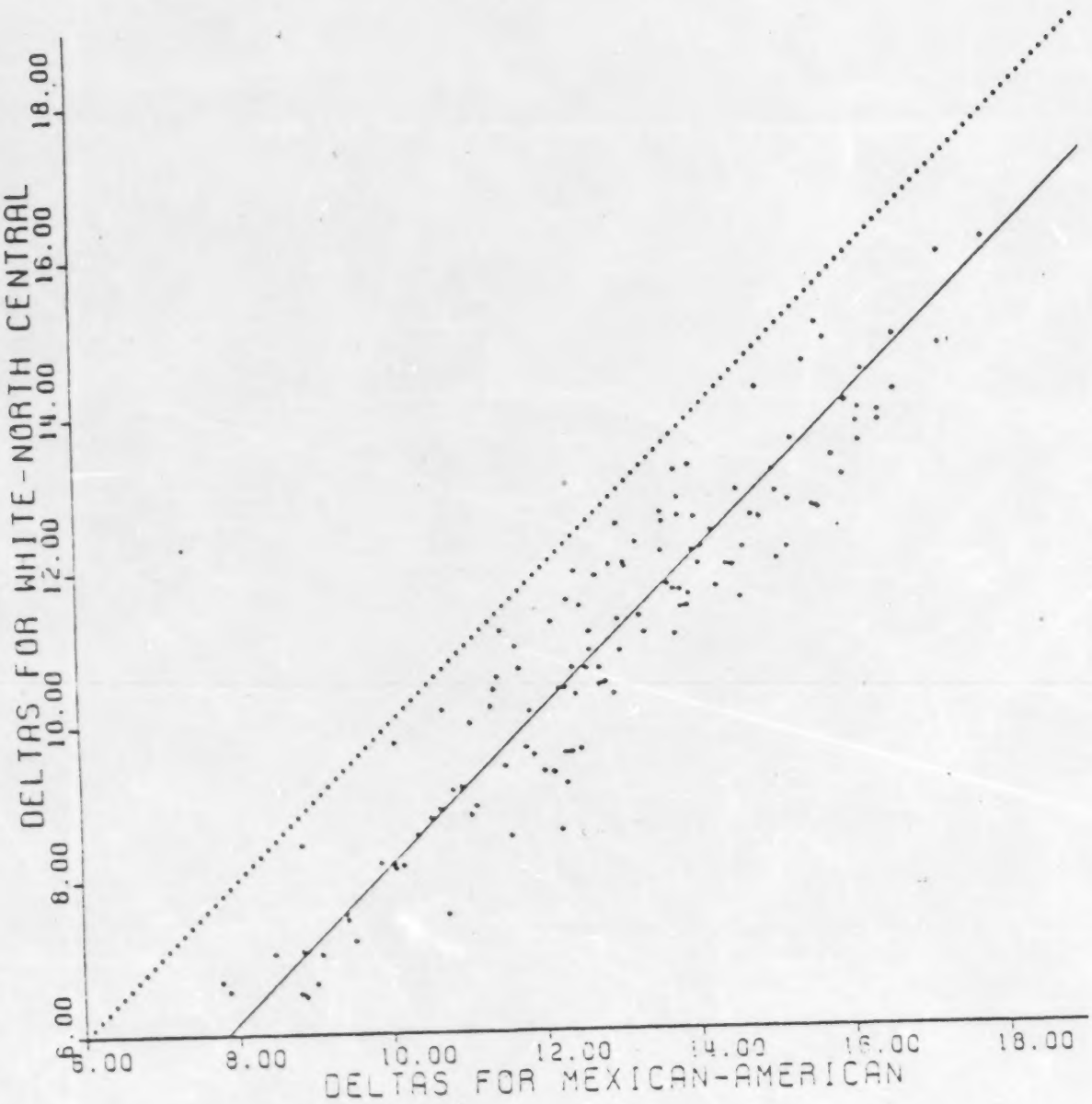
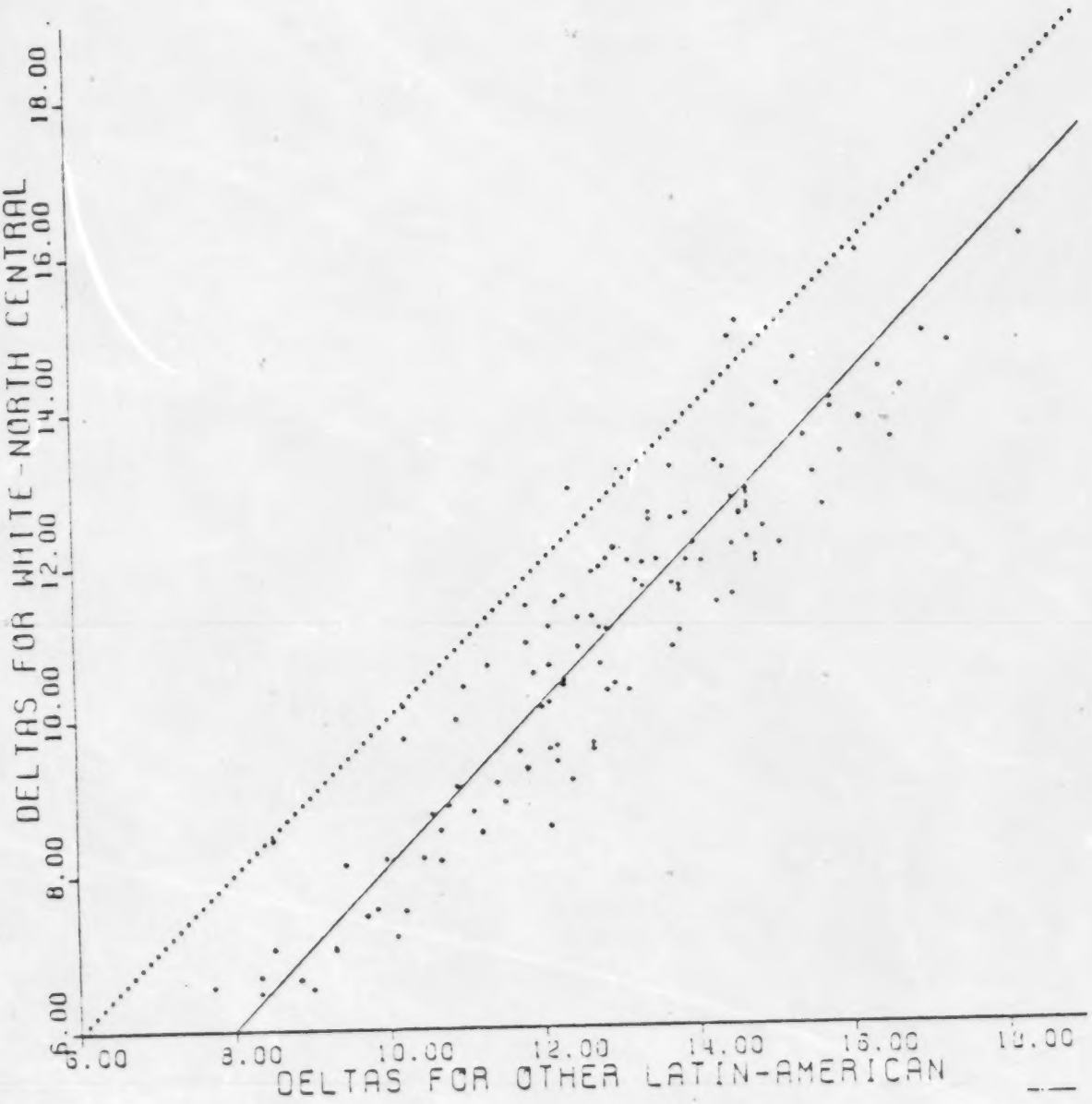


Figure 9

Cross-plot of Deltas for Other Latin-American



BAKKE AND BEYOND

Issues Related to Affirmative Action:
Policies and Programs for
Admission and Retention of Minority Students

A PRESENTATION BY

Paul B. Mohr, Sr.
Vice-President for Academic Affairs
Norfolk State College
Norfolk, Virginia 23504

FOR THE INVITATIONAL SEMINAR:
Bakke and Beyond

CO-SPONSORED BY:
The Inservice Education Program of
The Education Commission of the States

The Justice Program of Aspen Institute

IN COOPERATION WITH:
The Southern Regional Education Board
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Hyatt Regency Hotel
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October 19, 1978

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The multifaceted activities of the Pre- and Post-Bakke decision serve to legitimize the continuing concern of a number of well-intentioned individuals and organizations who share in a commitment to equalizing educational opportunity for minorities. The number of Amicus Curiae that were filed in behalf of special minority admissions programs reflects a great concern that the gains we have made in equalizing educational opportunity for minorities not be replaced by any retrogressive steps that the Powell decision may provide by its ambivalence, ambiguity, and often-times contradiction.

It is precisely this concern of retrogression that amplifies the necessity for such organizations as those represented here to continue the dialogue on Bakke. It is no small task for the Education Commission of the States, the Justice Program of the Aspen Institute, and the Southern Regional Education Board and others to quickly mobilize resources in order that we may respond to a national contingency that is personified by the Bakke case with its magnitude and complexity.

A part of the magnitude and complexity is attributed to the school of thought that reflects the Bakke case as a deficit model for the recruitment and admission of minorities to graduate and professional schools. One allegation is that "there has been a 9.1 percent drop in the number of minority first-year medical students since the Bakke case."[1]

Others of this particular school of thought constantly remind us minority underrepresentation in the professions can be dramatized by the fact that:

1. only about 2 percent of the nation's 380,000 physicians are Black.

2. no more than 2 percent of the Ph.D.'s in economics are Black.

3. less than 1 percent of the doctoral degree holders in engineering are Black.

4. of 325,000 lawyers in the United States, only 38 percent are Black.

The magnitude and complexity of the Bakke case is also attributed to the school of thought that some good has emerged from the Bakke case. Jack Greenberg of the Legal Defense and Educational Fund (LDF) says, "legally, the situation seems more hopeful."[2] Justice Powell's positive discussion of non-academic affirmative action plus the opinion of the Brennan four leaves room for various types of affirmative action to continue unimpaired."[3] "The Bakke decision will not interfere with or restrict HEW programs of special value and concern to minority groups," according to HEW Secretary Califano.[4]

American Council on Education (ACE) President J. W. Peltason and William G. Bowen, President of Princeton University and ACE Board Chairman made the following statement:

> "The six opinions handed down by the Supreme Court in the Bakke case require careful review before all of their implications can be known. Nonetheless, a first reading of the Court's decision indicates that race and ethnic background may be taken into account, along with other factors, in enrolling a diverse student body. We believe that the overwhelming number of admissions programs now in place meet the Constitutional standards as outlined by the Court.
>
> This is a most important decision. In the last decade American colleges and universities have made considerable progress in broadening the composition of their student bodies. There is, of course, much more to be accomplished, and on behalf of the American Council on Education we reaffirm our commitment to overcome the effects of invidious discrimination and to provide educational opportunities for all."[6]

The progress referred to by the ACE officials is reflected in a report on Changing Patterns in Graduate Schools:

CHANGING PATTERNS IN
GRADUATE SCHOOLS

Shifts among students in postgraduate education--
(percentage of enrollment)

MEDICAL SCHOOLS	1970-71	1977-78
Blacks	4.1%	6.7%
Hispanics	0.8%	3.8%
Whites	93.4%	85.1%
Other minorities	1.7%	4.4%
Women	9.6%	25.6%

LAW SCHOOLS	1970-71	1977-78
Blacks	3.9%	4.5%
Hispanics	1.1%	2.1%
Whites	94.2%	91.9%
Other minorities	0.8%	1.5%
Women	8.0%	27.4%

OTHER GRADUATE SCHOOLS.	1970-71	1977-78
Blacks	4.2%	6.0%
Hispanics	1.2%	2.2%
Whites	92.3%	83.6%
Other minorities	2.3%	8.2%
Women	38.7%	44.7%

*Source U. S. Department of Health, Education, and Welfare, Association Medical Colleges, Association of American Law Schools.

I hasten to add that a Task Force appointed by the Association of American Medical Colleges views the statistics as a slow down of minority admissions because there has been a virtual standstill in the minority enrollments over the past three years.

The implications of the Bakke decision may appear to have a more direct relationship to graduate and professional schools than undergraduate admission and this session today will reflect that interest. However, those who work primarily with institutions that are in need of enhancing equal educational opportunity for minorities in the undergraduate level, certainly see a number of questions arising as a result of the Bakke case.

ADAMS VS. CALIFANO

The concern for undergraduate admission of minorities is especially critical in the Southern states. Such is a result of pressure being placed on the states because of the Pratt decision in the Adams vs. Califano court case. This decision requires the desegregation of state systems of public higher education. Presently, six states are affected. However, eight other states are or will be under investigation by the Office of Health Education and Welfare.

The Pratt ruling emphasizes: "Perhaps the most serious problem in this area is the lack of state-wide planning to provide more and better-trained minority group doctors, lawyers, engineers, and other professionals."[7]

In requiring states to submit acceptable plans to desegregate state systems of public higher education, Judge Pratt ruled:

A. Adopt the goal that for two year and four year undergraduate public higher education institutions in the state system, taken as a whole, the proportion of black high school graduates throughout the State who enter such institutions shall be at least equal to the proportion of white high school graduates throughout the state who enter such institutions.

B. (1) Adopt the goal that there shall be an annual increase, to be specified by each state system, in the enrollment of black students in the traditionally white four year undergraduate public higher education institutions in the state system taken as a whole and in each such institution; and

(2) Adopt the objective of reducing the disparity between the proportion of black high school graduates and the proportion of white high school graduates entering traditionally white four year undergraduate public higher education institutions in the state system; and adopt the goal of reducing the current disparity by at least fifty percent by the academic year 1982-83. However, this shall not require any state to increase by that date black student admissions by more than 150% above the admissions for the academic year of 1976-77.[8]

C. Adopt the goal that the proportion of black state residents who graduate from undergraduate institutions in the state system and enter graduate study or professional state system shall be at least equal to the proportion of white state residents who graduate from undergraduate institutions in the state system and enter such schools.

This goal (and interim benchmarks or goals) shall be separately stated for each major area of graduate and professional study. To assure that his goal can be met in the immediate future special recruitment efforts should be considered at traditionally black institutions. Particular attention should be given to increasing black student enrollment and graduation from those traditionally white four year undergraduate institutions which serve as the feeder institutions for the graduate and professional schools. Achievement of this goal is of particular importance in light of the specific concern expressed by the Court of Appeals in Adams. In assessing progress toward this goal, OCR will give consideration to the number of blacks who enroll in graduate and professional schools outside the state system.

D. Commit the state to take all reasonable steps to reduce any disparity between the proportion of black and white students completing and graduating from the two year, four year and graduate public institutions of higher education, and establish interim goals, to be specified by the State system, for achieving annual progress.

E. Commit the State to expand mobility between two and four year institutions as a means of meeting the goals set forth in these criteria.

F. Specify timetables for sequential implementation of actions necessary to achieve these goals as soon as possible but not later than within five years (by the close of the academic year 1981-82) unless another date is specified in this section.

G. Commit the State and all its involved agencies and subdivisions to specific measures to achieve these goals.

SOME HIGHLIGHTS OF THE ADAMS CASE ARE:

1. State-wide coordinated plans rather than individual institutional plans are required.

2. Expansion of educational opportunity calls for affirmative action which goes beyond removal of barriers to access. A fundamental consideration is that equal benefits are derived from equal access.

3. Parity of enrollment is emphasized.

4. Parity of retention and progress from matriculation to graduation is also emphasized.

Several Policies emerge from either Bakke or the Adams which are not contradictory:

1. Race or ethnic background can be considered as a factor for admission.

2. Minority applicants should be considered on an individual basis rather than as a member of a special or preferred group.

3. Quotas are not acceptable.

4. Numerical projections as visible goals are acceptable.

5. Separate programs for reviewing admissions materials from minorities and non-minorities are unacceptable. Most recently Stanford University's Medical School has eliminated its separate minority program in a move to conform to the Bakke decision.

6. Test scores are not used exclusively as a criterion of admissions. Other variables are considered, such as leadership roles, community involvement, and work experience.

The Bakke and Adams cases have generated a number of questions about undergraduate admissions and retention programs which I shall discuss briefly:

1. What should be the affirmative action role of the undergraduate college as it relates to those supportive services that assure equal benefits of "access?" One school of thought emphasizes that such services should be provided all students who need them; however, they should be designed with the knowledge that they would be especially helpful to minority students because of past history and neglect.

2. Should undergraduate colleges do more to identify minority students who have potential for enrolling in graduate and professional schools and prepare them for such both by instruction and through counseling?

There is a retention expectancy at the undergraduate level. Therefore, some care must be taken in the selection of minority students to ascertain whether they have the potential for graduation. Just as graduate and professional institutions have the problem of balancing test scores and grade point averages with other indices less quantitative and more judgemental, the same problem prevails in the undergraduate admissions process. The resolution of such a problem has implications that can be utilized by the graduate and professional schools. For example; if the graduate or professional school is looking for evidence that a student with initial handicaps is showing signs of rising above those limitations, the students' progress at the undergraduate level becomes a valuable source of information when the application is reviewed at the graduate and professional school.

CONCLUSION

Increasingly those working with affirmative action efforts at the graduate and professional level are considering the importance of early identification of career and educational goals. They are also considering the importance of utilizing those motivational factors that overcome academic handicaps that may arise from school and home environments. Affirmative action efforts in behalf of graduate and professional schools can be greatly enhanced if a state-wide effort were made in which the entire spectrum of education is included. Presently, affirmative action programs are too stratefied at the elementary-secondary level, the community-college level, the four-year college level, and the post-graduate level.

NOTES

1. H. M. Michaux, Jr. "Bakke Decision Causes Problems Already." The Carolina Peacemaker. October 7, 1978, p. 1.

2. John Edgerton. Equality of Access in Post Secondary Education at Southern Education Foundation: Atlanta, Georgia, 1975.

3. Jack Greenberg. "The Meaning of Bakke's 'Window'." The Nation. July 22-29, 1978, p. 74.

4. Higher Education and National Affairs. "Review Shows Bakke Decision To Leave HEW Programs Intact." September 29, 1978, p. 7.

5. Higher Education and National Affairs. "ACE Officers Comment on Decision." June 30, 1978, p. 3.

6. U. S. News and World Report. "Impact of Bakke Decision." July 10, 1978, p. 16.

7. Adams vs. Richardson. 480 F. 2d 1159 (1973).

8. Leonard L. Haynes III. A Critical Examination of the Adams Case: A Source Book. Institute for Services to Education. Washington, D. C., 1978, k-17.